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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

Misc. No. 74-6521

MONICA ALDINGER, Petitioner,

v.

MERTON HOWARD, individually and in his capacity as Treasurer of Spokane County, and

SPOKANE COUNTY, a public corporation, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

Misc. No._____

MONICA ALDINGER, Petitioner,

v.

MERTON HOWARD, individually and in his capacity as Treasurer of Spokane County, and

SPOKANE COUNTY, a public corporation, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, MONICA ALDINGER, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 7, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The one page Order of Dismissal by the District Court for the Eastern District of Washington, entered September 25, 1973, also appears in the Appendix hereto.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit

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was entered on April 7, 1975. A petition for rehearing en banc was denied on April 7, 1975, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does the Federal District Court for the Eastern District of Washington have the power to join a pendent state claim that is related to an existing federal claim, when such joinder requires the inclusion of a party not then subject to federal jurisdiction.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In August, 1971, the petitioner was unlawfully and unconstitutionally terminated from her position in the Spokane County Treasurer's Office. As a consequence, petitioner filed a civil action, pursuant to 42 U.S.C. § 1983, against the treasurer of Spokane County and against the County of Spokane. The complaint alleged, inter alia, the deprivation of certain enumerated constitutional rights as well as asserted pendent jurisdiction over state law claims arising out of the same

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incident.

After various pre-trial matters of no importance to the instant petition, defendant Spokane County, citing Moor v. County of Alameda, ____U.S.____, 93 S.Ct 1785, 36 L.ed 2nd 596 (1973) moved for judgment on the pleadings, alleging that 42 U.S.C. § 1983 did not authorize jurisdiction over this corporate defendant. The District Court dismissed the federal claim against the County of Spokane. The federal claim against the treasurer, however, remained. In granting the Motion to Dismiss, the District Court further ruled that it did not have the power to exercise pendent jurisdiction over the state law claims against Defendant Spokane County, inasmuch as there was no longer an independent basis of federal jurisdiction over this defendant. An order to that effect was entered on September 25, 1973 (appended as Appendix A).

The petitioner, citing U.M.W. v. Gibbs, 383 U.S. 715, 86 S. Ct. 1139, 16 L.ed 2d 218 (1966), raised solely the "pendent jurisdiction" question on appeal to the Circuit Court of Appeals for the Ninth Circuit. The District Court's ruling was affirmed by an opinion entered April 7, 1975 (appended as Appendix B).

REASONS FOR GRANTING THE WRIT

I.

THERE IS A CONFLICT IN DECISIONS OF THE CIRCUIT COURTS OF APPEALS ON WHETHER UNITED MINE WORKERS V. GIBBS, 383 U.S. 715 (1966), ALLOWS A FEDERAL COURT THE POWER TO EXERCISE JURISDICTION OVER A PARTY ON A PENDENT STATE LAW CLAIM WHEN SUCH PARTY IS NOT INVOLVED IN THE RELATED FEDERAL CLAIM.

The decision of the court below holding that United Mine Workers v. Gibbs, supra, does not allow a federal court

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the power to exercise jurisdiction over a party on a pendent state law claim when there is no viable federal claim involving that party is directly in conflict with numerous decisions of other Circuit Courts of Appeals which have construed Gibbs on this issue. Moreover, not only is this conflict expressly recognized by the Circuit Courts of Appeals, but it has produced decisions in which there is express criticism of each other's position.

It is agreed by all that the opinion in Gibbs decides the question of whether the federal district court has the power to entertain pendent state law claims against parties over whom there is federal jurisdiction. The question, however, that has not yet been definitely answered is whether the district court has the power to exercise pendent jurisdiction over state law claims against parties over whom there is no independent basis of federal jurisdiction. It is upon this issue that the Ninth Circuit Court of Appeals differs with every other Circuit Court of Appeals that has considered the question.[1]

Each Circuit Court of Appeals that has had occasion to consider this issue has relied upon the holding in Gibbs, and particularly the following statements, to extend the concept of pendent jurisdiction to include the joinder of parties as well as of claims.

> "The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to

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[1] Compare Footnotes 29 and 30, Moor v. County of Alameda, 93 S. Ct. 1785 (1973).

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> try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole." (Emphasis the court's), 383 U.S. at 725, 86 S.Ct. at 1138.

and

> "Under the rules, the impulse is toward entertaining the broadest scope of action consistant with fairness to the parties; joinder of claims, parties, and remedies is strongly encouraged." (Emphasis added) 383 U.S. at 724 and 86 S.Ct. at 1138

Each Circuit Court has ruled, citing Gibbs as guidance, that the District Court may, as a matter of discretion, elect to join pendent parties. The Ninth Circuit, however, has steadfastly refused to budge from its pre-Gibbs holding that there is no power in the District Courts to entertain state claims against a party over whom there is no independent basis of federal jurisdiction.

This difference of opinion has resulted in expressed criticism by the Circuit Courts of Appeals of one anothers positions, and at present, constitutes an anomaly within the federal court system. It is an anomaly that encourages forum shopping, and provides significent benefits to litigants in one geographic area as opposed to another. Further, it is an anomaly that is unnecessary and unjustified, for the court below has not, in any of its prior decisions, provided a sound, reasonable, or practical basis for its holding. On the other hand, many of the Circuit Courts of Appeals, when extending pendent jurisdiction to include pendent parties, have expressed sound and practical reasons therefore.

"Pendent jurisdiction was devised to avoid the waste and inefficiency resulting from fragmenting a single action and

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dividing the pieces into separate proceedings before the state and federal courts, and to encourage a party who had a claim presenting a substantial federal question mixed with a non-federal claim, to take his bundle of claims to the federal court".[2] Typical of the statements by Circuit Courts of Appeals in support of this concept and practice are as follows:

> "...It would be an unjustifiable waste of judicial and professional time---indeed, a travesty on sound judicial administration--- to allow Astor to try its unfair competition claim against Buckley and Bantam in federal court but to require it to prosecute a claim involving precisely the same facts against Grosset 'in a state court a block away'. The absence of any constitutional barrier to entertaining a sufficiently related state claim against a person who was not a party to the federal claim was recognized, prior to Gibbs, in cases involving compulsory counter-claims under F.R. Civ. P. 13(a) (citations omitted), and third-party claims under F.R. Civ. P. 14 (citations omitted)." Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (CA 2 1971) at 629-30

and

> ".....the claims arise out of the same transaction and the proofs required (except as to amount of liability) are identical in every respect. Clearly, in the interest of avoiding sheer waste of court time, these claims should be tried together. We believe the District Judge was entirely correct in asserting pendent jurisdiction as to the 24 defendants." Beautytuft, Inc. v. Factory Insurance Association, 431 F.2d 112 (CA 6 1970) at 1128

and

> "In any event, we find ourselves in sympathy

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[2] Interestingly enough, this cogent analysis was made by Circuit Judge Hufstedler of the Ninth Circuit immediately prior to ruling that the concept of pendent jurisdiction applied solely to claims and not to parties. Hymer v. Chai, 407 Fed.2d 136 CA 9 (1969).

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> with the third circuit approach for appropriate cases; it makes good sense; it avoids forum shopping and multiple actions; it tends to reduce costs for litigants; and it avoids the waste of already heavily burdened judicial time." Hatridge v. Aetna Casualty & Surety Co., 415 Fed 2d 809 (CA 8 1969).

This quote was stated by Mr. Justice Blackmun when he served on the 8th Circuit Court of Appeals.

II

"WHETHER THERE EXISTS JUDICIAL POWER TO HEAR THE STATE LAW CLAIMS AGAINST THE COUNTY IS, IN SHORT, A SUBTLE AND COMPLEX QUESTION WITH FAR REACHING IMPLICATIONS".

The above quote by this court in the case of Moor v. County of Alameda, supra at 1799, provides the most persuasive reason for granting the instant petition for writ of certiorari. This accurate appraisal of the importance of the issue presented was made in a case very similar to the instant case. In that case, however, this court did not consider it appropriate to resolve this difficult issue because it was concluded that, even assuming the existence of power to hear the claim, the district court, in exercise of its legitimate discretion, properly declined to join the claims against the county. This is not the situation that is presented in the instant case. As the order of dismissal entered in the District Court reflects, the court felt itself to be without power to hear these claims and gave no indication of the propriety of doing so. In fact, the inclusion in the order of dismissal of a certificate pursuant to FRCP 54(b) and 28 U.S.C. §§ 1292(b) reflects the District Court's desire to have this question of law resolved.

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III

THE INSTANT CASE IS AN APPROPRIATE VEHICLE FOR RESOLUTION OF THIS IMPORTANT QUESTION.

The Court of Appeals for the Ninth Circuit, in voluminous dicta, suggests that this case does not provide a suitable opportunity for reconsidering its prior holdings. By so stating, the court below is doing precisely what it prohibits the district court from doing; analyzing, on a case by case basis, the appropriateness of exercising pendent jurisdiction over claims against a non-federal party.

The District Court did not take the liberty of so doing. The District Court ruled, as a matter of law, that it was without "...the power to exercise pendent jurisdiction over the claims against Spokane County, inasmuch as this court now has no independent basis of jurisdiction over this defendant". Hence, this case is unclouded by any suggestion that there was an exercise of discretion by the District Court. That court did not consider the merits of the claim against the county, nor did it consider the propriety of joining the county defendants. The court ruled simply that it was without the power to do so.

Petitioner seeks solely to allow the District Court the power to consider and determine whether it is appropriate to join her state claims against Defendant Spokane County with the existing federal claims against the County Treasurer. This is the power that the Second, Third, Fourth, Fifth, Sixth, and Eighth Circuit Courts of Appeals have granted to the district courts within their jurisdiction, and it is interesting to note that this power has been exercised in many diverse types of cases. The District and Circuit Courts have allowed the joinder

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of pendent parties, both plaintiffs and defendants, in federal question cases, diversity cases, admiralty cases,[3] cases under Section 301 of the Labor Management Relations Act[4], patent infringement cases[5], copyright infringement cases[6], cases under the Interstate Commerce Act, 49 U.S.C. 20[7], and Civil Rights cases[8]. In each of these cases, the court has exercised its discretion and has determined whether it was useful, necessary, helpful and/or convenient to allow non-federal claims against non-federal parties, provided such claims were appropriately related to an existing federal claim. The District Courts that reside within the Ninth Circuit presently do not have the power to exercise this discretion.

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[3] Leathers Best, Inc. v. S.S. Mormaclynx, 451 Fed. 2d 800 (CA 2, 1971).

[4] Connecticut General Life Insurance Co. v. Crofton, 415 Fed. 2d 41, (CA 5, 1969).

[5] Schulman v. Huckfinn, Inc., 472 Fed. 2d 864 (CA 8, 1973).

[6] Astor-Honor, Inc. v. Grosset and Dunlap, Inc., 441 Fed. 2d 627 (CA 2, 1971).

[7] Shippers and Receivers Coop. Association v. Penn Central Trans. Co., and F.F. Houghton & Co., Inc., 355 Fed 2d, 949, (E.D. Penn. 1973).

[8] Patrum v. City of Greensburg, 419 Fed. 2d 1300, (CA 6, 1969).

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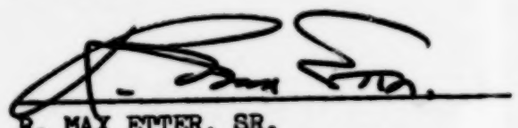
CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully Submitted,



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FILED IN THE
U. S. DISTRICT COURT
Eastern District of Washington

SEP 25 1973

J. R. FALLQUIST, Clerk

_____ Deputy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MONICA ALDINGER,
Plaintiff,
vs.
MERTON L. HOWARD, et al.,
Defendants.

No. 3556

ORDER OF DISMISSAL

Defendant's motion for judgment on the pleadings having come on for hearing, the plaintiff represented by her attorneys, Spokane County Legal Services by Norman Rosenberg, and Max Etter, Jr., defendants represented by Gerald Geiger, Deputy Prosecuting Attorney for Spokane County, and the court having before it and considering the memoranda of the parties and having heard and considered argument, it is hereby ordered as follows:

The defendant's motion for judgment on the pleadings is hereby granted and this action is dismissed as to the defendant Spokane County in that 42 U.S.C. 1983, and 42 U.S.C. 1988, do not empower this court to exercise jurisdiction over this defendant, nor has this court the power to exercise pendent jurisdiction over the claims against Spokane County, inasmuch as this court now has no independent basis of jurisdiction over this defendant.

CERTIFICATE PURSUANT TO FRCP 54(b) AND
28 U.S.C. 1292(b)

It is determined by the court that there is no just reason for delay and hereby directs the entry of final judgment as to the defendant Spokane County.

Further, this court is of the opinion that the above order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation.

DATED IN OPEN COURT THIS 24th DAY OF SEPTEMBER, 1973.

MARSHALL A. NEILL

UNITED STATES DISTRICT JUDGE

Approved as to form:

Attorney

Attorney for Plaintiff

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U.S. COURT OF APPEALS
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MONICA ALDINGER, a single woman,
Plaintiff-Appellant,
v.
MERTON L. HOWARD, individually and in his capacity as Treasurer of Spokane County, and JANE DOE HOWARD, his wife,
Defendants-Appellees.

No. 73-3129

OPINION

Appeal from the United States District Court
for the Eastern District of Washington

Before: CARTER, WRIGHT and WALLACE, Circuit Judges.

WRIGHT, Circuit Judge:

This is an appeal from an order dismissing appellant's action against Spokane County, Washington. The order of dismissal was certified by the district court, pursuant to Fed. R. Civ. P. 54(b), as appropriate for immediate appellate review. We have jurisdiction under 28 U.S.C. § 1292(b).

Appellant Monica Aldinger sued Spokane County, its county commissioners, and its elected county treasurer, Howard, and his wife. She sought injunctive and declaratory relief and damages for what she claimed was her wrongful dismissal from employment in the county treasurer's office.

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This dismissal, she asserted, was based solely on the allegation that she had been "living with [her] boy friend," and as such was subject to redress under the Civil Rights Act of 1871 [42 U.S.C. §§ 1983 and 1988] as a violation, under color of state law, of her constitutional rights under the First, Fifth, Ninth, and Fourteenth Amendments. Appellant also asserted that these same facts gave rise to a cause of action against the county under Wash. Rev. Code § 4.08.120 (1973) (providing for vicarious liability of counties in certain situations), and asked the district court to exercise pendent jurisdiction over these state law claims.

In granting the county's motion that it be dismissed as a party, the district court ruled that neither 42 U.S.C. § 1983 nor § 1988 provides for a federal cause of action against a county under 28 U.S.C. § 1343, and that the pendent state law claim against the county must therefore also be dismissed "inasmuch as this court now has no independent basis of jurisdiction over this defendant." We affirm.

A. FEDERAL QUESTION JURISDICTION.

Appellant contends that her second amended complaint stated a cause of action under the Civil Rights Act of 1871 [42 U.S.C. §§ 1983 and 1988 (1970)] which fell within the district court's 28 U.S.C. § 1343 jurisdiction.[1/] This argument is foreclosed by the Supreme Court's holding in Moor v. County of Alameda, 411 U.S. 693 (1973), aff'g in part and rev'g in part Moor v. Madigan, 458 F.2d 1217 (9th Cir. 1972).

In Moor, the Supreme Court addressed the same question as that presented here: whether these Civil Rights Act provisions apply to political subdivisions of a state. Relying heavily on its earlier decision in Monroe v. Pape, 365 U.S. 167 (1961), the Court concluded that:

> ". . . § 1983 is unavailable to these petitioners insofar as they seek to sue the County. And § 1988, in light of the express limitation contained within it, cannot be used to accomplish what Congress clearly refused to do in enacting § 1983."

411 U.S. at 710.

Both Moor v. County of Alameda and Monroe v. Pape were civil rights actions wherein the relief sought was money damages. In the case before us, the appellant sought declaratory and injunctive relief as well as damages.

However, any possibility that a political subdivision might be a suable "person" under §§ 1983 and 1988 for purposes of declaratory and injunctive relief was eliminated by the Court's subsequent decision in City of Kenosha v. Bruno, 412 U.S. 507 (1973). In that case, the Court reviewed a three-judge court's determination that § 1983 provided for 28 U.S.C. § 1343 jurisdiction over an action by owners of a retail liquor establishment against the city of Kenosha, Wisconsin. Their action challenged that city's failure to conduct formal adversary hearings before refusing to renew plaintiffs' liquor license. Reversing, the Court stated:

> "We find nothing in the legislative history discussed in Monroe, or in the language actually used by Congress, to suggest that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them. Since, as the Court held in Monroe, 'Congress did not undertake to bring municipal corporations within the

> ambit of' § 1983, id., at 187, they are outside of its ambit for purposes of equitable relief as well as for damages. The District Court was therefore wrong in concluding that it had jurisdiction of appellees' complaints under § 1343."

Id. at 513.

Finally, we consider City of Kenosha v. Bruno controlling even though plaintiffs in that case sought to enjoin the actions of a city rather than a county. Moor v. County of Alameda clearly indicates that this difference is inconsequential as to § 1983 liability by using the terms "municipality" and "political subdivision" interchangeably. See, e.g., 411 U.S. at 708. Consequently, the district court correctly determined that appellant failed to state a federal cause of action for either damages or for injunctive and declaratory relief.

B. JURISDICTION OVER THE PENDENT STATE LAW CLAIMS.

Appellant admits that, if the district court lacked jurisdiction over her federal causes of action against the county, it was required to dismiss her pendent state law claims against this defendant, together with the federal claims, by this court's decisions in Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969) and Moor v. Madigan, supra. She suggests, however, that we should now abandon the Hymer rationale because: (1) the Supreme Court's opinion in Moor v. County of Alameda left the continued validity of Hymer in considerable doubt; and (2) the great majority of other courts which have considered this question have determined that pendent jurisdiction should be available to join parties as well as claims. We disagree.

In Moor v. County of Alameda, the Court was presented with the very question which is before us: Can

a district court hear a party's state law claims against a named defendant over whom there is no independent federal basis for jurisdiction, where the nonfederal claims arise out of the same facts and circumstances as viable federal claims against other parties?

The Moor Court, however, purported to avoid reaching this question. Instead, it chose to affirm the alternative holding of the lower courts that "as a purely discretionary matter the federal court was an inappropriate forum to hear these state claims," (458 F.2d at 1221), even if there was federal court power to adjudicate them. 411 U.S. at 715-17.

In the case before us, the district judge made no alternative ruling on the suitability of this case for the discretionary exercise of pendent jurisdiction. Rather, he based his dismissal of the state law claims against Spokane County exclusively on the ground that, under this court's decisions in Hymer v. Chai and Moor v. Madigan, he had no power to hear claims against "pendent parties."

Appellant contends that Moor v. County of Alameda contains language which compels a re-examination of this court's opinions in Hymer and Moor.

In Hymer v. Chai, we first considered whether the Supreme Court's expansion of the doctrine of pendent jurisdiction in United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966), allowed joinder of additional parties as well as joinder of state law claims arising out of "a common nucleus of operative fact" with viable federal claims. We said that "[j]oinder of claims, not joinder of parties, is the object of the doctrine," 407 F.2d at 137, and held such an expansion unwarranted.

In Moor v. Madigan, we said:

> "We are thus confronted with a question on which there is an apparent conflict, but on which this court has previously taken a stand in Hymer. Having found ample support for the position taken by this court in Hymer and having been shown no compelling reason to reverse that stand, we conclude that the court below properly relied on Hymer in refusing to exercise jurisdiction over the pendent state claims."

458 F.2d at 1221 (footnote omitted).

In Moor v. County of Alameda, the Supreme Court noted that "Hymer stands virtually alone against [the] post-Gibbs trend in the courts of appeals" to permit district courts to hear pendent claims involving additional parties, where the entire action arises out of a single constitutional "case" as defined in Gibbs. 411 U.S. at 713-14. The Moor Court went on to note the substantial analogies between the joinder of parties under pendent jurisdiction and under expanded concepts of ancillary jurisdiction reflected in Fed. R. Civ. P. 13(a), 13(h), and 14(a).

However, the Supreme Court's opinion also recognized that there are strong arguments in favor of restricting at least certain types of state law actions to available state forums rather than hearing them in federal courts. The Court concluded that the question of federal judicial power to hear such state law claims against "pendent parties" is "a subtle and complex question with far-reaching implications," presenting difficult issues not appropriate for resolution in the case there before it. 411 U.S. at 715.

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It seems clear to us that we are not bound by any of the above-noted dicta in Moor v. County of Alameda to reconsider our decisions in Hymer v. Chai and Moor v. Madigan. We are therefore free to dispose of this issue on the basis of our previous stand in Hymer just as this court disposed of the similar challenge to the Hymer rationale in Moor v. Madigan. See 458 F.2d at 1221.

Appellants have also asked that this case be considered en banc, in the event that we should affirm the determination of the district court. We are not unaware of the widespread rejection of Hymer by other courts. In fact, support for this court's position seems to have eroded since our holding in Moor v. Madigan.[2/] However, we are of the opinion that any reconsideration of Hymer should occur in the context of a case which affords a more inviting opportunity for abandonment or modification of that opinion than does the one before us.

Judge Peckham's thoughtful analysis in Rundle v. Madigan, 331 F. Supp. 492 (N.D. Cal. 1971), demonstrates several reasons why a case like Moor or this one presents the weakest rationale for the expansion of Gibbs to cover pendent parties. See id. at 494-95. In the first place, appellant here seeks to press her state claims against a party defendant who would not otherwise be in federal court. This situation presents a greater risk of serious inconvenience to the defendant than does allowing an additional plaintiff to pursue his state claims in federal court against a defendant already subject to that court's jurisdiction as to other claims arising out of the same facts.

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Secondly, diversity cases have generally presented more attractive opportunities for the exercise of pendent jurisdiction over additional parties asserting state law claims than have analogous cases arising in the context of federal actions based on federal question jurisdiction. In part, this is due to the fact that since all the claims arising in the diversity context are based on state law, they are for that reason more easily tried together than cases where the two sets of claims are based on substantially different theories of law. Also, as Judge Peckham noted, in the diversity cases where joinder of "pendent parties" has been permitted, the courts have often been confronted with claims by members of a single family arising out of a single accident. "The litigation of these intimately related claims in a single forum makes good practical sense." 331 F. Supp. at 495.

We are also of the view that lower federal courts should be cautious in expanding Gibbs to the type of situation involved in this case. Pendent jurisdiction remains a judicially-created basis for federal court jurisdiction, albeit an eminently reasonable one in many cases. Since Congress specifically declined to render political subdivisions subject to suit under the Civil Rights Act of 1871, it is at least arguable that this legislation and Congress' failure to repeal it reflect a congressional disinclination to see local governmental units subjected to actions in federal courts arising out of alleged deprivations of the civil rights of their own citizens.[3/]

Finally, pendent state law claims arising in the context of federal civil rights actions will almost

inevitably involve the same sort of difficult and unsettled questions of state law, and result in the same concomitant potential for jury confusion, which the district court found likely in Rundle v. Madigan, supra.[4/] This prospect, we think, would usually prompt the district judge to refuse to exercise jurisdiction over the pendent claims against a city or county, even though he had the discretionary power to accept it.[5/] Hence, to say that there was power to adjudicate the state law claims would, in most cases such as this one, involve giving with one hand what will be taken away by the other.

The judgment of the district court is affirmed, and the district court is directed to proceed with appellant's actions against the remaining defendants.

FOOTNOTES

1/ Appellant's complaint also alleged that jurisdiction lay under 28 U.S.C. § 1331(a), and that the amount in controversy exceeded $10,000. A divided Second Circuit panel has recently found that such a jurisdictional allegation can sustain a direct action under the Fourteenth Amendment against a municipality not subject to the district court's § 1343 jurisdiction. Brault v. Town of Milton, ____ F.2d ____ (2d Cir., Feb. 24, 1975).

In Brault, however, the plaintiffs had relied on § 1331 as the sole asserted basis for federal question jurisdiction, and had consistently asserted a cause of action under the Fourteenth Amendment. Appellants in this action have consistently chosen to rely on their §§ 1983 and 1988 claims under § 1343, along with their pendent state claims, as the basis on which relief for Spokane County's alleged deprivations of their constitutional rights could be granted. Consequently, the district judge did not reach the question of whether the complaint would have been otherwise adequate to establish a § 1331 cause of action against a political subdivision of a state, nor need we reach that question here.

2/ Patrum v. City of Greensburg, 419 F.2d 1300 (6th Cir. 1969), was the only post-Gibbs appellate case from another circuit to which we were able to point in Moor v. Madigan, 458 F.2d at 1221, as supportive of Hymer. On reflection, however, this case cannot be said to stand for the proposition that, in all situations, the district court is without discretion to join pendent parties. The Sixth Circuit's rejection of the Hymer rationale is in any event made clear by that court's subsequent decision in F. C. Stiles Contracting Co. v. Home Insurance Co., 431 F.2d 917, 919-20 (6th Cir. 1970), cited in Moor v. County of Alameda, 411 U.S. at 713 n.29.

3/ Cf. Brault v. Town of Milton, ____ F.2d ____ (2d Cir., Feb. 24, 1975), slip op. at 1876 (Timbers, J., dissenting.

Of course, a county is still subject to a federal court action based on state law claims brought against it by a citizen of another state meeting the jurisdictional amount requirement. See Moor v. County of Alameda, 411 U.S. at 717-22.

4/ In Rundle v. Madigan, the district court found that adjudicating the state law claims would require it "to resolve difficult questions of [state] law upon which state court decisions are not legion." 331 F. Supp. at 495 n.5. The court also took particular note of the complex nature of the defenses and justifications Alameda County might be able to raise. Id.

In the case before us, the district court did not consider whether similar defenses would have been available to the county in an action under Wash. Rev. Code § 4.08.020. However, appellee has suggested several difficult issues relating to its susceptibility to vicarious liability under that section in cases of this sort. It would thus appear that the potential for jury confusion would also have been substantial in this case. The jury would have had to keep in mind the distinct state law standards applicable to each class of defendants, as well as the relevant criteria for assessing the possible § 1983 liability of the non-county defendants.

5/ Courts which have had occasion to make such discretionary rulings on the appropriateness of joining pendent municipal or county defendants in federal civil rights actions against local officials have regularly opted to dismiss the pendent claims. See, e.g., Patrum v. City of Greensburg, 419 F.2d 1300, 1302 (6th Cir. 1969); cf. Moor v. County of Alameda, 411 U.S. at 715-17; Moor v. Madigan, 458 F.2d at 1221. Even if we were to accept appellant's suggestion and remand this case, there is no reason to expect that the district judge would not act similarly and exercise his discretion against hearing the pendent claims against Spokane County.

Supreme Court, U. S.
FILED
DEC 12 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 74-6521

MONICA ALDINGER,
Petitioner,

—*v.*—

MERTON L. HOWARD, individually and in his capacity as Treasurer of Spokane County, and SPOKANE COUNTY, a public corporation,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 12, 1975
CERTIORARI GRANTED OCTOBER 6, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6521

MONICA ALDINGER,

Petitioner,

—*v.*—

MERTON L. HOWARD, individually and in his capacity as Treasurer of Spokane County, and SPOKANE COUNTY, a public corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

September 21, 1971 Plaintiff's complaint filed in U.S. district court for the eastern district of Washington.

October 6, 1971 Plaintiff's amended complaint filed.

February 22, 1973 Defendant's answer to amended complaint filed.

August 17, 1973 Defendant Spokane County's motion for judgment on the pleadings filed.

August 22, 1973 Plaintiff's second amended complaint filed.

September 25, 1973 Judgment of dismissal of claims against defendant Spokane County entered.

October 11, 1973 Plaintiff's notice of appeal to the court of appeals for the ninth circuit filed.

October 11, 1973 Agreed statement of case filed.

April 7, 1975 Opinion of the court of appeals for the ninth circuit entered.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 3556

MONICA ALDINGER, a single woman, PLAINTIFF,

v.

MERTON L. HOWARD, ET AL., DEFENDANTS.

AMENDED COMPLAINT

I. NATURE OF CLAIM

1. This is an action for declaratory and injunctive relief and damages pursuant to 42 U.S.C. § 1983 to redress violations of rights secured to plaintiff by the First, Ninth and Fourteenth Amendments to the United States Constitution. Plaintiff seeks a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202, that her dismissal from employment in the office of the County Treasurer of Spokane County, Washington, violated her constitutionally protected right to privacy and to freedom of expression and association, her right to equal protection of the laws, and her right to procedural and substantive due process. Inasmuch as plaintiff's dismissal was authorized by § 36.16.070 of the Revised Code of Washington, plaintiff seeks a declaratory judgment that this statute, on its face and as so applied, is similarly unconstitutional. Plaintiff further seeks a temporary restraining order and, upon hearing before a three-judge district court, pursuant to 28 U.S.C. § 2281 and § 2284, preliminary and permanent injunction restraining defendants from dismissing her from her employment, and restraining the operation of § 36.16.070 of the Revised Code of Washington inasmuch as it authorizes such dismissal.

II. JURISDICTION

2. Jurisdiction lies under 28 U.S.C. § 1331(a) and §§ 1343(3) and (4). The amount in controversy, exclusive of interests and costs, exceeds $10,000.

III. THREE-JUDGE DISTRICT COURT

3. The defendant County Treasurer's dismissal of plaintiff from h[illegible] employment was done under the asserted authority of § 36.16.070 of the Revised Code of Washington, which provided for dismissal of employment by a county officer "at [his] pleasure." Plaintiff seeks preliminary and permanent injunction restraining her dismissal, and restraining the operation of § 36.16.070 inasmuch as it authorizes such dismissal on the grounds that the dismissal and the statute, on its face and as so applied, violates plaintiff's constitutional rights. 28 U.S.C. § 2281 and § 2284 require that the action be heard and decided by a three-judge district court.

IV. PARTIES

4. Plaintiff MONICA ALDINGER is a citizen of the United States and a resident of the City of Spokane, Spokane County, Washington. Her address is West 212 Seventh Avenue, Apartment 4.

5. Defendant MERTON L. HOWARD is the County Treasurer of the Defendant Spokane County, Washington. Plaintiff is ignorant as to the true name of the named JANE DOE who, upon information and belief, is the wife of the defendant MERTON L. HOWARD. Because of lack of knowledge of the true name of the aforestated defendant JANE DOE, this defendant is sued herein under said name as a fictitious name and plaintiff prays that when the true name of this defendant is ascertained it may be inseted herein, and in all subsequent proceedings in said action, and that the said action may then proceed against her under her true name.

6. Defendant SPOKANE COUNTY is a public corporation and an action may be maintained against it authorized by RCW 4.08.120.

7. Defendants WILLIAM O. ALLEN, E. W. (BILL) PARSONS and RAY W. CHRISTENSEN are County Commissioners of the defendant SPOKANE COUNTY, Washington.

V. STATEMENT OF CLAIM

8. Plaintiff was employed in a filing and recording position in the Spokane County Treasurer's Office by defendant HOWARD on July 1, 1971. Plaintiff was employed at a salary of $98.00 per week.

9. On or about September 1, 1971, plaintiff was informed by defendant HOWARD that she would be dismissed as an employee of Spokane County, Washington.

10. In a letter (a copy of which is attached as Exhibit "A" dated August 30, 1971) defendant HOWARD informed plaintiff that, though her performance on the job had been "excellent," she was to be dismissed as an employee of Spokane County, Washington, because she was allegedly "living with [her] boy friend." On September 15, 1971, plaintiff was dismissed as an employee of Spokane County, Washington.

11. Plaintiff has performed her duties as a filer and recorder for Spokane County, Washington, diligently and her dismissal was based solely on the allegation that she was living with her boy friend.

12. No hearing on the issues raised by the dismissal of plaintiff was held prior to the dismissal, though plaintiff's attorney requested such a hearing.

13. No hearing on the issues raised by the dismissal of plaintiff has been held to date, though plaintiff's attorney has requested such a hearing.

14. The County Treasurer's dismissal of plaintiff was done under the asserted authority of § 36.16.070 of the Revised Code of Washington.

15. Plaintiff has no adequate remedy at law. The action of the defendants is causing, and will continue to cause, irreparable injury to plaintiff unless enjoined by this Court.

VI. FIRST CAUSE OF ACTION

16. Defendant's failure to notify plaintiff of the charges against her and to conduct a hearing prior to

plaintiff's dismissal and their continued failure to provide such notice or hearing violates plaintiff's rights under the due process clause of the Fourteenth Amendment to the United States Constitution. Inasmuch as plaintiff's dismissal in this matter was authorized by § 36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, has similarly violated plaintiff's rights under the due process clause of the Fourteenth Amendment to the United States Constitution.

VII. SECOND CAUSE OF ACTION

17. Defendants' dismissal of plaintiff from public employment violates plaintiff's rights under the due process clause of the Fourteenth Amendment to the United States Constitution in that the reason for the dismissal is arbitrary, vague and unreasonable. Inasmuch as plaintiff's dismissal was authorized by § 36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's rights under the due process clause of the Fourteenth Amendment to the United States Constitution.

VIII. THIRD CAUSE OF ACTION

18. Defendants' dismissal of plaintiff from public employment violates her right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. Inasmuch as plaintiff's dismissal was authorized by § 36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's rights under the equal protection clause of the Fourteenth Amendment to the United States Constitution.

IX. FOURTH CAUSE OF ACTION

19. Defendants' dismissal of plaintiff from public employment violates plaintiff's right to privacy as protected by the First and Ninth Amendments and the due process clause of the Fourteenth Amendment to the United States

Constitution. Inasmuch as plaintiff's dismissal was authorized by § 36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's constitutionally protected right to privacy.

X. FIFTH CAUSE OF ACTION

20. Defendant's dismissal of plaintiff from public employment violates plaintiff's rights to freedom of expression and association as protected by the First Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution. Inasmuch as plaintiff's dismissal was authorized by § 36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution.

XI. PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that:

A. A three-judge district court be convened to hear and decide this action, in accordance with 28 U.S.C. § 2281 and § 2284;

B. Pending the hearing and disposition of this action by a three-judge district court, a temporary restraining order be granted, pursuant to 28 U.S.C. § 2284(3), restraining defendants from dismissing plaintiff and permitting her to resume her employment;

C. Upon hearing before a three-judge district court:

[1] Preliminary and permanent injunctions be issued restraining defendants from violating plaintiff's constitutional rights by dismissing her from her employment, as alleged above, and restraining the operation of § 36.16.070 of the Revised Code of Washington inasmuch as it authorizes such dismissal;

[2] A declaratory judgment be entered declaring the County Treasurer's dismissal of plaintiff, and § 36.16.070 of the Revised Code of Washington, inasmuch as it authorizes such dismissal, on its face and as so applied, to be violative of plaintiff's rights under the United States Constitution, as alleged above;

[3] Plaintiff be awarded damages for her salary loss and other injuries suffered as a result of the unlawful acts alleged above;

[4] That plaintiff be awarded the costs and disbursements of this action;

[5] Plaintiff be granted such other and further relief as the Court feels just and proper.

DATED: October 6, 1971

SPOKANE, WASHINGTON

Respectfully submitted:

SPOKANE COUNTY
LEGAL SERVICES

/s/ Byron G. Powell
BYRON G. POWELL
Attorney for Plaintiff

Of Counsel:

DENNIS YEAGER, ROBERT ROBERTS
National Employment Law Project
401 West 117th Street
New York, New York

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 3556

[Filed in the U.S. District Court, Eastern District of Washington, Feb. 22, 1973, J. R. Fallquist, Clerk, M. R., Deputy]

MONICA ALDINGER, PLAINTIFF

v.

MERTON L. HOWARD, ET AL., DEFENDANTS

DEFENDANTS ANSWER TO PLAINTIFF'S AMENDED COMPLAINT

COME NOW the defendants herein and in answer to the amended complaint of the plaintiff herein, admit, deny and allege as follows:

I — JURISDICTION

1. The defendants deny paragraph two of the amended complaint in its entirety as to any jurisdiction of this Court arising under either 28 USC Section 1331 (a) or 28 USC Section 1343 (3) and (4).

II — PARTIES

2. In answering the allegations of paragraph four of the amended complaint, the defendants are without information of the plaintiff's status as a citizen of the United States. Therefore as to this the defendants are unable to form a belief and therefore deny the same. Defendants admit that the plaintiff was a resident of Spokane at the time of her employment by defendant Howard.

3. In answering the allegations of paragraph five of the amended complaint, the defendants admit that Merton L. Howard is the County Treasurer of the defendant Spokane County, Washington. Defendants deny that any action may be brought in this Court against Mrs. Jane Doe Howard.

4. As to the allegations of paragraph six of the amended complaint, defendants admit that defendant Spokane County is a public corporation. Defendants deny, however, that RCW 4.08.120 is authority for this action in Federal Court against the County.

5. As to the allegations of paragraph seven of the amended complaint, the defendants admit the same.

III — STATEMENT OF CLAIM

6. In answering the allegations of paragraph eight and nine of the amended complaint, the defendants admit the same.

7. In answering the allegations of paragraph ten of the amended complaint, the defendants admit only that the letter referred to in the plaintiff's amended complaint was requested by and given to plaintiff after her employment had been terminated.

8. In answering the allegations of paragraphs eleven, twelve and thirteen of the amended complaint, the defendants deny each and every allegation contained herein.

9. In answering the allegations of paragraph fourteen of the amended complaint, the defendants admit the same.

10. In answering the allegations of paragraph fifteen of the amended complaint, the defendants deny the same.

IV — PLAINTIFF'S CAUSES OF ACTION

11. In answering the allegations of paragraphs sixteen, seventeen, eighteen, nineteen, and twenty of the plaintiff's amended complaint, the defendants deny each and every allegation contained therein.

V — DEFENSES

By way of further answer, and as matters of affirmative defense, defendants allege as follows:

12. Defendants allege as a defense lack of jurisdiction over the subject matter.

13. Defendants allege as a defense lack of judisdiction over the defendant County, the defendant County Commissioners, and the defendant Mrs. Jane Doe Howard.

14. Defendants allege as a defense the failure of plaintiff to state a claim upon which relief can be granted.

15. Defendants allege as a defense that defendant Howard was at all times acting pursuant to RCW 36-.16.070 which statute is presumed to be constitutional.

16. The defendants allege that plaintiff's conduct, attire, attitude, and performance were detrimental to the morale, efficiency, and harmony of the Treasurer's office.

17. The defendants further allege that the letter referred to in the amended complaint does not reflect nor was it ever intended to reflect the real reason for plaintiff's dismissal but merely was an attempt to recite the least objectionable grounds for plaintiff's dismissal.

18. Defendants further allege that plaintiff was given an adequate hearing by defendant Howard prior to her dismissal.

19. Defendants further allege that as a result of plaintiff's openly admitted violation of a Washington Criminal Statute RCW 9.79.120, defendant Howard, as a publicly elected official, was acting within his authority under RCW 36.16.070, and with a proper exercise of his discretion.

VI — PRAYER

WHEREFORE, defendants having fully answered the amended complaint of plaintiff on file herein, said defendants pray that:

A. The plaintiff's amended complaint be dismissed with prejudice;

B. Plaintiff's request for a temporary restraining order, and preliminary and permanent injunctions be denied;

C. That defendants be awarded their costs herein and that the Court grant such other relief as it deems proper.

DATED this 22nd day of February, 1973.

Respectfully submitted,

DONALD C. BROCKETT,
Prosecuting Atty.
Spokane, Washington

By /s/ Garald A. Gesinger
GARALD A. GESINGER,
Deputy Prosecuting
Attorney,
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 3556

[Filed in the U.S. District Court, Eastern District of Washington, Aug. 22, 1973, J. R. Fallquist, Clerk, L. R., Deputy]

MONICA ALDINGER, a single woman, PLAINTIFF

vs.

MERTON L. HOWARD, ET AL., DEFENDANTS

SECOND AMENDED COMPLAINT

I. NATURE OF CLAIM

1. This is an action for declaratory and injunctive relief and damages pursuant to 42 U.S.C. § 1983 to redress violations of rights secured to plaintiff by the First, Ninth and Fourteenth Amendments to the United States Constitution. Plaintiff seeks a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202, that her dismissal from employment in the office of the County Treasurer of Spokane County, Washington, violated her constitutionally protected right to privacy and to freedomdom of expression and association, her right to equal protection of the laws, and her right to procedural and substantive due process. Inasmuch as plaintiff's dismissal was authorized by § 36.16.070 of the Revised Code of Washington, plaintiff seeks a declaratory judgment that this statute, on its face and as so applied, is similarly unconstitutional. Plaintiff further seeks a temporary restraining order and, upon hearing before a three-judge district court, pursuant to 28 U.S.C. §§ 2281 and 2284, preliminary and permanent injunction restraining defendants from dismissing her from her employment, and restraining the operation of § 36.16.070 of the Re-

vised Code of Washington inasmuch as it authorizes such dismissal.

II. JURISDICTION

2. Jurisdiction lies under 28 U.S.C. § 1331(a) and §§ 1343(3) and (4). The amount in controversy, exclusive of interests and costs, exceeds $10,000. Further, the Federal District Court may exercise Pendant Jurisdiction over the state law claims against the parties as more fully set forth herein.

III. THREE-JUDGE DISTRICT COURT

3. The defendant County Treasurer's dismissal of plaintiff from her employment was done under the asserted authority of § 36.16.070 of the Revised Code of Washington, which provided for dismissal of employment by a county officer "at [his] pleasure." Plaintiff seeks preliminary and permanent injunction restraining her dismissal, and restraining the operation of § 36.16.070 inasmuch as it authorizes such dismissal on the grounds that the dismissal and the statute, on its face and as so applied, violates plaintiff's constitutional rights. 28 U.S.C. §§ 2281 and 2284 require that the action be heard and decided by a three-judge district court.

IV. PARTIES

4. Plaintiff is a citizen of the United States and resides in Spokane, Washington, at the time of her dismissal from employment with the County Treasurer.

5. Defendant Merton L. Howard is the County Treasurer of the defendant Spokane County, Washington, and at all times herein was acting both individually and in his official capacity as the treasurer and agent of defendant Spokane County. Plaintiff is ignorant as to the true name of the named Jane Doe, who, upon information and belief, is the wife of the defendant Merton L. Howard. Because of lack of knowledge of the true name of the aforementioned defendant Jane Doe, this defendant is sued herein under said name as a fictitious name

and plaintiff prays that when the true name of this defendant is ascertained it may be inserted herein, and in all subsequent proceedings in said action, and that the said action may then proceed against her under her true name.

6. Defendant Spokane County is a public corporation and an action may be maintained against it authorized by RCW 4.08.120.

7. Defendants William O. Allen, E. W. (Bill) Parsons and Ray W. Christensen are County Commissioners of the defendant Spokane County, Washington.

V. STATEMENT OF CLAIM

8. Plaintiff was employed in a filing and recording position in the Spokane County Treasurer's Office by defendant Merton L. Howard on July 1, 1971. Plaintiff was employed at a salary of $98.00 per week.

9. On or about September 1, 1971, plaintiff was informed by defendant Howard that she would be dismissed as an employee of Spokane County, Washington.

10. In a letter dated August 30, 1971, defendant Howard informed plaintiff that, though her performance on the job had been "excellent," she was to be dismissed as an employee of Spokane County because she was allegedly "living with [her] boy friend." On September 15, 1971, plaintiff was dismissed as an employee of Spokane County, Washington.

11. Plaintiff has performed her duties as a filer and recorder for Spokane County, Washington, diligently and her dismissal was based solely on the allegation that she was living with her boy friend.

12. No hearing on the issues raised by the dismissal of plaintiff was held prior to the dismissal, though plaintiff's attorney requested such a hearing.

13. No hearing on the issues raised by the dismissal of plaintiff has been held to date, though plaintiff's attorney has requested such a hearing.

14. The County Treasurer's dismissal of plaintiff was done under the asserted authority of § 36.16.070 of the Revised Code of Washington.

15. Plaintiff has no adequate remedy at law. The action of the defendants is causing, and will continue to cause, irreparable injury to plaintiff.

VI. FIRST CAUSE OF ACTION

16. Defendant's failure to notify plaintiff of the charges against her and to conduct a hearing prior to plaintiffs' dismissal and their continued failure to provide such notice or hearing violates plaintiff's rights under the due process clause of the Fourteenth Amendment to the United States Constitution. Inasmuch as plaintiff's dismissal in this matter was authorized by § 36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, has similarly violated plaintiff's rights under the due process clause of the Fourteenth Amendment to the United States Constitution.

VII. SECOND CAUSE OF ACTION

17. Defendants' dismissal of plaintiff from public employment violates plaintiff's rights under the due process clause of the Fourteenth Amendment to the United States Constitution in that the reason for the dismissal is arbitrary, vague and unreasonable. Inasmuch as plaintiff's dismissal was authorized by § 36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's rights' under the due process clause of the Fourteenth Amendment to the United States Constitution.

VIII. THIRD CAUSE OF ACTION

18. Defendants' dismissal of plaintiff from public employment violates her right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. Inasmuch as plaintiff's dismissal was authorized by § 36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's rights under the due

process clause of the Fourteenth Amendment to the United States Constitution.

IX. FOURTH CAUSE OF ACTION

19. Defendants' dismissal of plaintiff from public employment violates plaintiff's right to privacy as protected by the First and Ninth Amendments and the due process clause of the Fourteenth Amendment to the United States Constitution. Inasmuch as plaintiff's dismissal was authorized by § 36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's constitutionally protected right to privacy.

X. FIFTH CAUSE OF ACTION

20. Defendants' dismissal of plaintiff from public employment violates plaintiff's rights to freedom of expression and association as protected by the First Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution. Inasmuch as plaintiff's dismissal was authorized by § 36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution.

XI. PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that:

A. A three-judge district court be convened to hear and decide this action, in accordance with 28 U.S.C. §§ 2281 and 2284;

B. Pending the hearing and disposition of this action by a three-judge district court, a temporary restraining order be granted, pursuant to 28 U.S.C. § 2284(3), restraining defendants from dismissing plaintiff and permitting her to resume her employment;

C. Upon hearing before a three-judge district court:

(1) Preliminary and permanent injunctions be issued restraining defendants from violating plaintiff's constitutional rights by dismissing her from her employment, as alleged above, and restraining the operation of § 36.16.070 of the Revised Code of Washington inasmuch as it authorizes such dismissal;

(2) A declaratory judgment be entered declaring the County Treasurer's dismissal of plaintiff, and § 36.16.070 of the Revised Code of Washington, inasmuch as it authorizes such dismissal, on its face and as so applied, to be violative of plaintiff's rights under the United States Constitution, as alleged above;

(3) Plaintiff be awarded damages for her salary loss and other injuries suffered as a result of the unlawful acts alleged above;

(4) That plaintiff be awarded the costs and disbursements of this action;

(5) Plaintiff be granted such other and further relief as the Court feels just and proper.

DATED THIS 15th DAY OF AUGUST, 1973.

Respectfully submitted,

SPOKANE COUNTY LEGAL SERVICES

BY: /s/ Norman R. Rosenberg
NORMAN R. ROSENBERG,
Attorney for plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 3556

[Filed in the U.S. District Court, Eastern District of Washington, Aug. 17, 1973; J. R. Fallquist, Clerk, L. R., Deputy]

MONICA ALDINGER, PLAINTIFF

v.

MERTON L. HOWARD, ET AL., DEFENDANTS

MOTION FOR JUDGMENT ON THE PLEADINGS

The defendants, SPOKANE COUNTY, WILLIAM O. ALLEN, E. W. (BILL) PARSONS, and RAY W. CHRISTENSEN, by their attorney, Garald A. Gesinger, Deputy Prosecuting Attorney for Spokane County, move the Court for Judgment of Dismissal as to these named defendants, based upon the pleadings heretofore filed in this matter, pursuant to Rule 12(c) of the Rules of Civil Procedure for the United States District Court.

Dated this 17th day of August, 1973.

/s/ Garald A. Gesinger
GARALD A. GESINGER
Deputy Prosecuting Attorney
Attorney for Defendants

Copy Received the 15th day of August, 1973.

/s/ Norman Rosenberg
Attorney for Plaintiff

/s/ R. Max Etter
Attorney for Plaintiff

MOTION FOR JUDGMENT
ON THE PLEADINGS

DONALD C. BROCKETT
Spokane County Prosecuting Attorney
County-City Public Safety Building
Spokane, Washington 99201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 3556

[Filed in the U.S. District Court, Eastern District of Washington, Sept. 25, 1973, J. R. Fallquist, Clerk, M. R., Deputy]

MONICA ALDINGER, PLAINTIFF

vs.

MERTON L. HOWARD, ET AL., DEFENDANTS

ORDER OF DISMISSAL

Defendant's motion for judgment on the pleadings having come on for hearing, the plaintiff represented by her attorneys, Spokane County Legal Services by Norman Rosenberg, and Max Etter, Jr., defendants represented by Garald Gesinger, Deputy Prosecuting Attorney for Spokane County, and the court having before it and considering the memoranda of the parties and having heard and considered argument, it is hereby ordered as follows:

The defendant's motion for judgment on the pleadings is hereby granted and this action is dismissed as to the defendant Spokane County in that 42 U.S.C. 1983, and 42 U.S.C. 1988, do not empower this court to exercise jurisdiction over this defendant, nor has this court the power to exercise pendent jurisdiction over the claims against Spokane County, inasmuch as this court now has no independent basis of jurisdiction over this defendant.

CERTIFICATE PURSUANT TO FRCP 54(b) AND 28 U.S.C. 1292(b)

It is determined by the court that there is no just reason for delay and hereby directs the entry of final judgment as to the defendant Spokane County.

Further, this court is of the opinion that the above order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation.

DONE IN OPEN COURT THIS 24th DAY OF SEPTEMBER, 1973.

/s/ Marshall A. Niell
MARSHALL A. NIELL
Judge

/s/ Garald Gesinger
GARALD GESINGER
Deputy Prosecuting Attorney

APPROVED BY:

/s/ Norman Rosenberg
NORMAN ROSENBERG
Attorney for plaintiffs

Entered in Civil Docket on 9/25/73—M. R.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 3556

[Filed in the U.S. District Court, Eastern District of Washington, Oct. 11, 1973, J. R. Fallquist, Clerk, M. R., Deputy]

MONICA ALDINGER, PLAINTIFF

vs.

MERTON L. HOWARD, ET AL., DEFENDANTS

AGREED STATEMENT OF THE CASE

Pursuant to Rule 10(d), Federal Rules of Appellate Procedure the following agreed statement of the case along with the second amended complaint, the answer thereto, and the motion for and judgment of dismissal, shall constitute the record on appeal herein:

1. The action was filed on September 21, 1971.

2. All defendants filed and served their answers to the complaint. Discovery procedures commenced, and a pre trial conference and date and trial date were set.

3. Defendant Spokane County moved for judgment of dismissal as to them on August 17, 1973. A copy of the motion is attached hereto.

4. A judgment of dismissal as to defendant Spokane County was entered on September 25, 1973.

It is from the above judgment of dismissal attached hereto and incorporated herein that plaintiff appellant appeals.

/s/ Garald Gesinger
GARAND GESINGER, Deputy
Prosecuting Attorney for Defendant

/s/ Norman Rosenberg
NORMAN ROSENBERG
Attorney for Plaintiff

/s/ Max Etter, Jr.
MAX ETTER
Attorney for Plaintiff

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-3129

[Filed Apr. 7, 1975, U.S. Court of Appeals]

MONICA ALDINGER, a single woman,
PLAINTIFF-APPELLANT

v.

MERTON L. HOWARD, individually and in his capacity as Treasurer of Spokane County, and JANE DOE HOWARD, his wife, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Eastern District of Washington

OPINION

Before: CARTER, WRIGHT and WALLACE, Circuit Judges.

WRIGHT, Circuit Judge:

This is an appeal from an order dismissing appellant's action against Spokane County, Washington. The order of dismissal was certified by the district court, pursuant to Fed. R. Civ. P. 54(b), as appropriate for immediate appellate review. We have jurisdiction under 28 U.S.C. § 1292(b).

Appellant Monica Aldinger sued Spokane County, its county commissioners, and its elected county treasurer, Howard, and his wife. She sought injunctive and declaratory relief and damages from what she claimed was her wrongful dismissal from employment in the county treasurer's office.

This dismissal, she asserted, was based solely on the allegation that she had been "living with [her] boy friend," and as such was subject to redress under the Civil Rights Act of 1871 [42 U.S.C. §§ 1983 and 1988]

as a violation, under color of state law, of her constitutional rights under the First, Fifth, Ninth, and Fourteenth Amendments. Appellant also asserted that these same facts gave rise to a cause of action against the county under *Wash. Rev. Code* § 4.08.120 (1973) (providing for vicarious liability of counties in certain situations), and asked the district court to exercise pendent jurisdiction over these state law claims.

In granting the county's motion that it be dismissed as a party, the district court ruled that neither 42 U.S.C. § 1983 nor § 1988 provides for a federal cause of action against a county under 28 U.S.C. § 1343, and that the pendent state law claim against the county must therefore also be dismissed "inasmuch as this court now has no independent basis of jurisdiction over this defendant." We affirm.

A. FEDERAL QUESTION JURISDICTION.

Appellant contends that her second amended complaint stated a cause of action under the Civil Rights Act of 1871 [42 U.S.C. §§ 1983 and 1988 (1970)] which fell within the district court's 28 U.S.C. § 1343 jurisdiction.[1] This argument is foreclosed by the Supreme Court's holding in *Moor* v. *County of Alameda*, 411 U.S. 695 (1973),

[1] Appellant's complaint also alleged that jurisdiction lay under 28 U.S.C. § 1331(a), and that the amount in controversy exceeded $10,000. A divided Second Circuit panel has recently found that such a jurisdictional allegation can sustain a direct action under the Fourteenth Amendment against a municipality not subject to the district court's § 1343 jurisdiction. *Brault* v. *Town of Milton*, —— F.2d —— (2d Cir., Feb. 24, 1975).

In *Brault*, however, the plaintiffs had relied on § 1331 as the sole asserted basis for federal question jurisdiction, and had consistently asserted a cause of action under the Fourteenth Amendment. Appellants in this action have consistently chosen to rely on their §§ 1983 and 1988 claims under § 1343, along with their pendent state claims, as the basis on which relief for Spokane County's alleged deprivations of their constitutional rights could be granted. Consequently, the district judge did not reach the question of whether the complaint would have been otherwise adequate to establish a § 1331 cause of action against a political subdivision of a state, nor need we reach that question here.

aff'g in part and rev'g in part Moor v. *Madigan*, 458 F.2d 1217 (9th Cir. 1972).

In *Moor*, the Supreme Court addressed the same question as that presented here: whether these Civil Rights Act provisions apply to political subdivisions of a state. Relying heavily on its earlier decision in *Monroe* v. *Pape*, 365 U.S. 167 (1961), the Court concluded that:

> ". . . § 1983 is unavailable to these petitioners insofar as they seek to sue the County. And § 1988, in light of the express limitation contained within it, cannot be used to accomplish what Congress clearly refused to do in enacting § 1983."

411 U.S. at 710.

Both *Moor* v. *County of Alameda* and *Monroe* v. *Pape* were civil rights actions wherein the relief sought was money damages. In the case before us, the appellant sought declaratory and injunctive relief as well as damages.

However, any possibility that a political subdivision might be a suable "person" under §§ 1983 and 1988 for purposes of declaratory and injunctive relief was eliminated by the Court's subsequent decision in *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973). In that case, the Court reviewed a three-judge court's determination that § 1983 provided for 28 U.S.C. § 1343 jurisdiction over an action by owners of a retail liquor establishment against the city of Kenosha, Wisconsin. Their action challenged that city's failure to conduct formal adversary hearings before refusing to renew plaintiffs' liquor license. Reversing, the Court stated:

> "We find nothing in the legislative history discussed in *Monroe*, or in the language actually used by Congress, to suggest that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them. Since, as the Court held in *Monroe*, 'Congress did not undertake to bring municipal corporations within the ambit of' § 1983, *id.*, at 187, they are outside of its ambit for purposes of equitable relief as well as for damages. The District Court was therefore wrong in concluding that it had jurisdiction of appellees' complaints under § 1343."

Id. at 513.

Finally, we consider *City of Kenosha* v. *Bruno* controlling even though plaintiffs in that case sought to enjoin the actions of a city rather than a county. *Moor* v. *County of Alameda* clearly indicates that this difference is inconsequential as to § 1983 liability by using the terms "municipality" and "political subdivision" interchangeably. *See, e.g.*, 411 U.S. at 708. Consequently, the district court correctly determined that appellant failed to state a federal cause of action for either damages or for injunctive and declaratory relief.

B. JURISDICTION OVER THE PENDENT STATE LAW CLAIMS.

Appellant admits that, if the district court lacked jurisdiction over her federal causes of action against the county, it was required to dismiss her pendent state law claims against this defendant, together with the federal claims, by this court's decisions in *Hymer* v. *Chai*, 407 F.2d 136 (9th Cir. 1969) and *Moor* v. *Madigan*, *supra*. She suggests, however, that we should now abandon the *Hymer* rationale because: (1) the Supreme Court's opinion in *Moor* v. *County of Alameda* left the continued validity of *Hymer* in considerable doubt; and (2) the great majority of other courts which have considered this question have determined that pendent jurisdiction should be available to join parties as well as claims. We disagree.

In *Moor* v. *County of Alameda*, the Court was presented with the very question which is before us: Can a district court hear a party's state law claims against a named defendant over whom there is no independent federal basis for jurisdiction, where the nonfederal claims arise out of the same facts and circumstances as viable federal claims against other parties?

The *Moor* Court, however, purported to avoid reaching this question. Instead, it chose to affirm the alternative

holding of the lower courts that "as a purely discretionary matter the federal court was an inappropriate forum to hear these state claims," (458 F.2d at 1221), *even if* there was federal court power to adjudicate them. 411 U.S. at 715-17.

In the case before us, the district judge made no alternative ruling on the suitability of this case for the discretionary exercise of pendent jurisdiction. Rather, he based his dismissal of the state law claims against Spokane County exclusively on the ground that, under this court's decisions in *Hymer* v. *Chai* and *Moor* v. *Madigan*, he had no power to hear claims against "pendent parties."

Appellant contends that *Moor* v. *County of Alameda* contains language which compels a re-examination of this court's opinions in *Hymer* and *Moor*.

In *Hymer* v. *Chai*, we first considered whether the Supreme Court's expansion of the doctrine of pendent jurisdiction in *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966), allowed joinder of additional parties as well as joinder of state law claims arising out of "a common nucleus of operative fact" with viable federal claims. We said that "[j]oinder of claims, not joinder of parties, is the object of the doctrine," 407 F.2d at 137, and held such an expansion unwarranted.

In *Moor* v. *Madigan*, we said:

> "We are thus confronted with a question on which there is an apparent conflict, but on which this court has previously taken a stand in *Hymer*. Having found ample support for the position taken by this court in *Hymer* and having been shown no compelling reason to reverse that stand, we conclude that the court below properly relied on *Hymer* in refusing to exercise jurisdiction over the pendent state claims."

458 F.2d at 1221 (footnote omitted).

In *Moor* v. *County of Alameda*, the Supreme Court noted that "*Hymer* stands virtually alone against [the] post-*Gibbs* trend in the courts of appeals" to permit district courts to hear pendent claims involving additional parties, where the entire action arises out of a single constitutional "case" as defined in *Gibbs*. 411 U.S. at

713-14. The *Moor* Court went on to note the substantial analogies between the joinder of parties under pendent jurisdiction and under expanded concepts of ancillary jurisdiction reflected in Fed. R. Civ. P. 13(a), 13(h), and 14(a).

However, the Supreme Court's opinion also recognized that there are strong arguments in favor of restricting at least certain types of state law actions to available state forums rather than hearing them in federal courts. The Court concluded that the question of federal judicial power to hear such state law claims against "pendent parties" is "a subtle and complex question with far-reaching implications," presenting difficult issues not appropriate for resolution in the case there before it. 411 U.S. at 715.

It seems clear to us that we are not bound by any of the above-noted dicta in *Moor* v. *County of Alameda* to reconsider our decisions in *Hymer* v. *Chai* and *Moor* v. *Madigan*. We are therefore free to dispose of this issue on the basis of our previous stand in *Hymer* just as this court disposed of the similar challenge to the *Hymer* rationale in *Moor* v. *Madigan*. *See* 458 F.2d at 1221.

Appellants have also asked that this case be considered *en banc*, in the event that we should affirm the determination of the district court. We are not unaware of the widespread rejection of *Hymer* by other courts. In fact, support for this court's position seems to have eroded since our holding in *Moor* v. *Madigan*.[2] However, we are of the opinion that any reconsideration of *Hymer* should occur in the context of a case which affords a more invit-

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[2] *Patrum* v. *City of Greensburg*, 419 F.2d 1300 (6th Cir. 1969), was the only post-*Gibbs* appellate case from another circuit to which we were able to point in *Moor* v. *Madigan*, 458 F.2d at 1221, as supportive of *Hymer*. On reflection, however, this case cannot be said to stand for the proposition that, in all situations, the district court is without discretion to join pendent parties. The Sixth Circuit's rejection of the *Hymer* rationale is in any event made clear by that court's subsequent decision in *F. C. Stiles Contracting Co.* v. *Home Insurance Co.*, 431 F.2d 917, 919-20 (6th Cir. 1970), *cited in Moor* v. *County of Alameda*, 411 U.S. at 713 n.29.

ing opportunity for abandonment or modification of that opinion than does the one before us.

Judge Peckham's thoughtful analysis in *Rundle* v. *Madigan*, 331 F. Supp. 492 (N.D. Cal. 1971), demonstrates several reasons why a case like *Moor* or this one presents the weakest rationale for the expansion of *Gibbs* to cover pendent parties. *See id.* at 494-95. In the first place, appellant here seeks to press her state claims against a party defendant who would not otherwise be in federal court. This situation presents a greater risk of serious inconvenience to the defendant than does allowing an additional plaintiff to pursue his state claims in federal court against a defendant already subject to that court's jurisdiction as to other claims arising out of the same facts.

Secondly, diversity cases have generally presented more attractive opportunities for the exercise of pendent jurisdiction over additional parties asserting state law claims than have analogous cases arising in the context of federal actions based on federal question jurisdiction. In part, this is due to the fact that since all the claims arising in the diversity context are based on state law, they are for that reason more easily tried together than cases where the two sets of claims are based on substantially different theories of law. Also, as Judge Peckham noted, in the diversity cases where joinder of "pendent parties" has been permitted, the courts have often been confronted with claims by members of a single family arising out of a single accident. "The litigation of these intimately related claims in a single forum makes good practical sense." 331 F. Supp. at 495.

We are also of the view that lower federal courts should be cautious in expanding *Gibbs* to the type of situation involved in this case. Pendent jurisdiction remains a judicially-created basis for federal court jurisdiction, albeit an eminently reasonable one in many cases. Since Congress specifically declined to render political subdivisions subject to suit under the Civil Rights Act of 1871, it is at least arguable that this legislation and Congress' failure to repeal it reflect a congressional disinclination to see local governmental units subjected to

actions in federal courts arising out of alleged deprivations of the civil rights of their own citizens.[3]

Finally, pendent state law claims arising in the context of federal civil rights actions will almost inevitably involve the same sort of difficult and unsettled questions of state law, and result in the same concomitant potential for jury confusion, which the district court found likely in *Rundle* v. *Madigan*, *supra*.[4] This prospect, we think, would usually prompt the district judge to refuse to exercise jurisdiction over the pendent claims against a city or county, even though he had the discretionary power to accept it.[5] Hence, to say that there was power to adjudi-

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[3] *Cf. Brault* v. *Town of Milton*, —— F.2d —— (2d Cir., Feb. 24, 1975), slip op. at 1876 (Timbers, J., dissenting.

Of course, a county is still subject to a federal court action based on state law claims brought against it by a citizen of another state meeting the jurisdictional amount requirement. *See Moor* v. *County of Alameda*, 411 U.S. at 717-22.

[4] In *Rundle* v. *Madigan*, the district court found that adjudicating the state law claims would require it "to resolve difficult questions of [state] law upon which state court decisions are not legion." 331 F. Supp. at 495 n.5. The court also took particular note of the complex nature of the defenses and justifications Alameda County might be able to raise. *Id.*

In the case before us, the district court did not consider whether similar defenses would have been available to the county in an action under Wash. Rev. Code § 4.08.020. However, appellee has suggested several difficult issues relating to its susceptibiilty to vicarious liability under that section in cases of this sort. It would thus appear that the potential for jury confusion would also have been substantial in this case. The jury would have had to keep in mind the distinct state law standards applicable to each class of defendants, as well as the relevant criteria for assessing the possible § 1983 liability of the non-county defendants.

[5] Courts which have had occasion to make such discretionary rulings on the appropriateness of joining pendent municipal or county defendants in federal civil rights actions against local officials have regularly opted to dismiss the pendent claims. *See, e.g., Patrum* v. *City of Greensburg*, 419 F.2d 1300, 1302 (6th Cir. 1969); *cf. Moor* v. *County of Alameda*, 411 U.S. at 715-17; *Moor* v. *Madigan*, 458 F.2d at 1221. Even if we were to accept appellant's suggestion and remand this case, there is no reason to expect that the district judge would not act similarly and exercise his discretion against hearing the pendent claims against Spokane County.

cate the state law claims would, in most cases such as this one, involve giving with one hand what will be taken away by the other.

The judgment of the district court is affirmed, and the district court is directed to proceed with appellant's actions against the remaining defendants.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-3129
DC #3556

[Filed in the U.S. District Court, Eastern District of Washington, June 13, 1975, J. R. Fullquist, Clerk, ——, Deputy]

MONICA ALDINGER, a single woman,
PLAINTIFF-APPELLANT

v.

MERTON L. HOWARD, individually and in his capacity as Treasurer of Spokane County, and JANE DOE HOWARD, his wife, DEFENDANTS-APPELLEES

APPEAL from the United States District Court for the Eastern District of Washington (Spokane)

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Clerk directed to enter this 12th day of June, 1975.

/s/ Marshall A. Niell
United States District Judge

Filed and entered April 7, 1975

A TRUE COPY
ATTEST Jun. 10, 1975

EMIL E. MELFI, JR.
Clerk

by /s/ [Illegible]
Deputy

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-6521

MONICA ALDINGER, PETITIONER

v.

MERTON L. HOWARD, ETC., ET AL.

On petition for writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 6, 1975

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 598980 161

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-6521

MONICA ALDINGER,

Petitioner,

v.

MERTON HOWARD, individually and in his capacity as Treasurer of Spokane County, and

SPOKANE COUNTY, a public corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-6521

MONICA ALDINGER,

Petitioner,

v.

MERTON HOWARD, individually and in his capacity as Treasurer of Spokane County, and

SPOKANE COUNTY, a public corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The respondent, SPOKANE COUNTY, respectfully prays that the petition for a writ of certiorari in the above-entitled matter be denied.

STATEMENT OF THE CASE

The petitioner was terminated from her position in the Spokane County Treasurer's Office in 1971, as she alleges. However, it was not until the Second Amended Complaint was filed some two years later that any assertion or question of pendent

jurisdiction was made by petitioner.

The sole reference to pendent jurisdiction made by petitioner in her second amended complaint was the conclusory statement that: "Further, the Federal District Court may exercise Pendant [sic] Jurisdiction over the state law claims against the parties as more fully set forth herein."

No state claim whatsoever against the respondent County was stated upon which any relief could be granted. In the paragraph entitled "Parties", petitioner merely stated: "Defendant Spokane County is a public corporation and an action may be maintained against it authorized by R.C.W. 4.08.120."

The Revised Code of Washington (R.C.W.), section 4.08.120 provides as follows:

> "Actions against public corporations. An action may be maintained against a county or other of the public corporations mentioned or described in RCW 4.08.110, either upon a contract made by such county, or other public corporation in its corporate character and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation."

REASONS FOR DENYING THE WRIT

It is respectfully submitted by respondent Spokane County that the Supreme Court does not have jurisdiction over this petition due to its mootness.

Even assuming for the sake of argument that petitioner's second amended complaint stated a state law claim upon which relief can be granted, petitioner has failed to comply with the state law regarding the conditions precedent to the maintenance of an action for damages against a county.

R.C.W. 36.45.010 provides as follows:

> "Time for filing. All claims for damages against any county must be presented before the board of commissioners and filed with the clerk thereof within one hundred and twenty days from the date that the damage occurred or the injury was sustained."

R.C.W. 36.45.030, which is entitled "Time for Commencement of Action," provides as follows:

> "No action shall be maintained on any claim for damages until it has been presented to the board of county commissioners and sixty days have elapsed after such presentation but such action must be commenced within three months after the sixty days have elapsed or within three months after the board has given the claimant notice by registered mail of disallowance in whole or in part of the claim for damages, whichever is longer."

The Washington law concerning the failure to file a timely claim against the County as a bar to maintenance of an action against the County is well settled. The Washington court has repeatedly held that R.C.W. 36.45.030 makes the filing of a claim with the Board of County Commissioners a procedural condition precedent to the maintenance of an action. Although it has been held that it is not necessary to plead the filing of such a claim, the defendant may raise the objection that no claim was filed, whereupon the burden is on the plaintiff to show he has complied with the statute. Goodner v. Chicago Milwaukee, etc. R. Co., 61 Wn.2d 12, 27,377 P.2d 231 (1962). See also Thorgaard Plumbing & Heating Co., Inc. v. County of King, 71 Wn.2d 126, 426 P.2d 828 (1967). Cook v. Clallam County, 27 Wn.2d 793, 180 P. 2d 573 (1947); and cases cited therein.

The petitioner here has simply never filed the requisite claim for damages with the Board of County Commissioners. Therefore the District Court will have no alternative under applicable state law but to dismiss the complaint against the respondent County even if this Court were to hold that federal courts have the power to join a pendent state claim in a proper case.

In spite of petitioner's attractively framed theoretical question, the question nevertheless remains precisely that as far as this petitioner is concerned -- a theoretical question which cannot affect this particular litigant's rights or legal relations with this respondent.

This court very recently had the occasion to reiterate the familiar and long-recognized proposition that "federal courts are without power to decide questions that cannot affect the rights of litigants in this case before them. North Carolina v. Rice, 404 U.S. 244, 246, 30 L.Ed. 2d 413, 92 S.Ct. 402 (1971)." DeFunis v. Odegaard, 416 U.S. 312, 316, 40 L.Ed. 2d 164, 94 S.Ct. 1704 (1974).

The court in DeFunis went on to state:

> ". . . . The inability of the federal judiciary 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.' Liner v. Jafco, Inc. 375 301, 306 n 3, 11 L.Ed. 2d 347, 84 S.Ct. 391 (1964); see also Powell v. McCormack, 395 US 486, 496 n 7, 23 L.Ed 2d 491, 89 S.Ct. 1944 (1969); Sibron v. New York, 392 US 40, 50 n 8, 20 L.Ed 2d 917, 88 S.Ct. 1889 (1968). Although as a matter of Washington state law it appears that this case would be saved from mootness by 'the great public interest in the continuing issues raised by this appeal,' 82 Wash. 2d 11, 23 n 6, 507 P.2d 1169, 1177 N 6 (1973), the fact remains that under Art. III '[e]ven in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction.' North Carolina v. Rice, supra, at 246, 30 L.Ed. 2d 413." Ibid

The court in Powell v. McCormack, 395 U.S. 486, 23 L.Ed. 2d 491, 89 S.Ct. 1944 (1969) defined a moot case as follows:

> "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. See E. Borchard, Declaratory Judgments 35-37 (2d ed. (1941)."

Respondent submits that since petitioner herein has failed to perform a mandatory condition precedent to the maintenance of its purported state law claim, the decision of the question presented cannot affect the petitioner's rights in the instant matter. Petitioner lacks a legally cognizable interest in the outcome of this matter.

CONCLUSION

For these reasons the petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

DONALD C. BROCKETT
GARALD A. GESINGER

Attorneys for Respondents

APPENDIX

FILED IN THE
U. S. DISTRICT COURT
Eastern District of Washington
AUG 22 1973
J. R. FALLQUIST, Clerk
Deputy

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

MONICA ALDINGER, a single woman,
Plaintiff,

vs.

MERTON L. HOWARD, et al.,
Defendants.

No. 3556

SECOND AMENDED COMPLAINT

I. NATURE OF CLAIM

1. This is an action for declaratory and injunctive relief and damages pursuant to 42 U.S.C. §1983 to redress violations of rights secured to plaintiff by the First, Ninth and Fourteenth Amendments to the United States Constitution. Plaintiff seeks a declaratory judgment, pursuant to 28 U.S.C. §§2201 and 2202, that her dismissal from employment in the office of the County Treasurer of Spokane County, Washington, violated her constitutionally protected right to privacy and to freedom of expression and association, her right to equal protection of the laws, and her right to procedural and substantive due process. Inasmuch as plaintiff's dismissal was authorized by §36.16.070 of the Revised Code of Washington, plaintiff seeks a declaratory judgment that this statute, on its face and as so applied, is similarly unconstitutional. Plaintiff further seeks a temporary restraining order and, upon hearing before a three-judge district court, pursuant to 28 U.S.C. §§2281 and 2284, preliminary and permanent injunction restraining defendants from dismissing her from her employment, and restraining the operation of §36.16.070 of the Revised Code of Washington inasmuch as it authorizes such dismissal.

II. JURISDICTION

2. Jurisdiction lies under 28 U.S.C. §1331(a) and §§1343 (3) and (4). The amount in controversy, exclusive of interests and costs, exceeds $10,000. Further, the Federal District Court may exercise Pendant Jurisdiction over the state law claims against the parties as more fully set forth herein.

III. THREE-JUDGE DISTRICT COURT

3. The defendant County Treasurer's dismissal of plaintiff from her employment was done under the asserted authority of

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SPOKANE, WA. 99201
RI 7-4118

§36.16.070 of the Revised Code of Washington, which provided for dismissal of employment by a county officer "at [his] pleasure." Plaintiff seeks preliminary and permanent injunction restraining her dismissal, and restraining the operation of §36.16.070 inasmuch as it authorizes such dismissal on the grounds that the dismissal and the statute, on its face and as so applied, violates plaintiff's constitutional rights. 28 U.S.C. §§2281 and 2284 require that the action be heard and decided by a three-judge district court.

IV. PARTIES

4. Plaintiff is a citizen of the United States and resided in Spokane, Washington, at the time of her dismissal from employment with the County Treasurer.

5. Defendant Merton L. Howard is the County Treasurer of the defendant Spokane County, Washington, and at all times herein was acting both individually and in his official capacity as the treasurer and agent of defendant Spokane County. Plaintiff is ignorant as to the true name of the named Jane Doe, who, upon information and belief, is the wife of the defendant Merton L. Howard. Because of lack of knowledge of the true name of the aforementioned defendant Jane Doe, this defendant is sued herein under said name as a fictitious name and plaintiff prays that when the true name of this defendant is ascertained it may be inserted herein, and in all subsequent proceedings in said action, and that the said action may then proceed against her under her true name.

6. Defendant Spokane County is a public corporation and an action may be maintained against it authorized by RCW 4.08.120.

7. Defendants William O. Allen, E. W. (Bill) Parsons and Ray W. Christensen are County Commissioners of the defendant Spokane County, Washington.

V. STATEMENT OF CLAIM

8. Plaintiff was employed in a filing and recording position in the Spokane County Treasurer's Office by defendant Merton L. Howard on July 1, 1971. Plaintiff was employed at a salary of $98.00 per week.

9. On or about September 1, 1971, plaintiff was informed by defendant Howard that she would be dismissed as an employee of Spokane County, Washington.

10. In a letter dated August 30, 1971, defendant Howard informed plaintiff that, though her performance on the job had been "excellent," she was to be dismissed as an employee of Spokane County because she was allegedly "living with [her] boy friend." On September 15, 1971, plaintiff was dismissed as an employee of Spokane County, Washington.

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11. Plaintiff has performed her duties as a filer and recorder for Spokane County, Washington, diligently and her dismissal was based solely on the allegation that she was living with her boy friend.

12. No hearing on the issues raised by the dismissal of plaintiff was held prior to the dismissal, though plaintiff's attorney requested such a hearing.

13. No hearing on the issues raised by the dismissal of plaintiff has been held to date, though plaintiff's attorney has requested such a hearing.

14. The County Treasurer's dismissal of plaintiff was done under the asserted authority of §36.16.070 of the Revised Code of Washington.

15. Plaintiff has no adequate remedy at law. The action of the defendants is causing, and will continue to cause, irreparable injury to plaintiff.

VI. FIRST CAUSE OF ACTION

16. Defendant's failure to notify plaintiff of the charges against her and to conduct a hearing prior to plaintiff's dismissal and their continued failure to provide such notice or hearing violates plaintiff's rights under the due process clause of the Fourteenth Amendment to the United States Constitution. Inasmuch as plaintiff's dismissal in this matter was authorized by §36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, has similarly violated plaintiff's rights under the due process clause of the Fourteenth Amendment to the United States Constitution.

VII. SECOND CAUSE OF ACTION

17. Defendants' dismissal of plaintiff from public employment violates plaintiff's rights under the due process clause of the Fourteenth Amendment to the United States Constitution in that the reason for the dismissal is arbitrary, vague and unreasonable. Inasmuch as plaintiff's dismissal was authorized by §36.16.070 of the Revised Cose of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's rights' under the due process clause of the Fourteenth Amendment to the United States Constitution.

VIII. THIRD CAUSE OF ACTION

18. Defendants' dismissal of plaintiff from public employment violates her right to equal protection of the laws under

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SPOKANE, WA. 99201
RI 7-4118

the Fourteenth Amendment to the United States Constitution. Inasmuch as plaintiff's dismissal was authorized by §36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's rights under the due process clause of the Fourteenth Amendment to the United States Constitution.

IX. FOURTH CAUSE OF ACTION

19. Defendants' dismissal of plaintiff from public employment violates plaintiff's right to privacy as protected by the First and Ninth Amendments and the due process clause of the Fourteenth Amendment to the United States Constitution. Inasmuch as plaintiff's dismissal was authorized by §36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's constitutionally protected right to privacy.

X. FIFTH CAUSE OF ACTION

20. Defendants' dismissal of plaintiff from public employment violates plaintiff's rights to freedom of expression and association as protected by the First Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution. Inasmuch as plaintiff's dismissal was authorized by §36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution.

XI. PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that:

A. A three-judge district court be convened to hear and decide this action, in accordance with 28 U.S.C. §§2281 and 2284;

B. Pending the hearing and disposition of this action by a three-judge district court, a temporary restraining order be granted, pursuant to 28 U.S.C. §2284 (3), restraining defendants from dismissing plaintiff and permitting her to resume her employment;

C. Upon hearing before a three-judge district court:

(1) Preliminary and permanent injunctions be issued restraining defendants from violating plaintiff's constitutional rights by dismissing her from her employment, as alleged above, and restraining the operation of §36.16.070 of the Revised Code of Washington inasmuch as it authorizes such dismissal;

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(2) A declaratory judgment be entered declaring th County Treasurer's dismissal of plaintiff, and §36.16.070 of the Revised Code of Washington, inasmuch as it authorizes such dismissal, on its face and as so applied, to be violative of plaintiff's rights under the United States Constitution, as alleged above;

(3) Plaintiff be awarded damages for her salary loss and other injuries suffered as a result of the unlawful acts alleged above;

(4) That plaintiff be awarded the costs and disbursements of this action;

(5) Plaintiff be granted such other and further relief as the Court feels just and proper.

DATED THIS 15th DAY OF AUGUST, 1973.

Respectfully submitted,
SPOKANE COUNTY LEGAL SERVICES

BY: Norman Rosenberg
NORMAN R. ROSENBERG,
Attorney for plaintiff

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RI 7-4118

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

Misc. No. 74-6521

MONICA ALDINGER, Petitioner,

v.

MERTON HOWARD, individually and in his capacity as Treasurer of Spokane County, and

SPOKANE COUNTY, a public corporation, Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

R. MAX ETTER, SR.
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I. RESPONDENT IS RAISING THE ISSUE OF THE MERITS OF THE CLAIM AND MOOTNESS FOR THE FIRST TIME ON APPEAL.

Respondent, in his response to the Petition for Writ of Certiorari, raises the merits, or alleged lack of merits, of our state claim against the respondent as his basis for urging this court to deny Certiorari, thus, raising this issue for the first time on this appeal; the issue of the merits of the claim was not raised in the District Court below. Further, he is asking this court to do what the District Court felt it without the power to do.

The sole purpose of the Petition for Certiorari is to determine whether the District Court for the Eastern District of Washington has the power to consider the merits of petitioner's state claims. All petitioner seeks to do is to present the merits of her state claims to the District Court, and she is ready, willing and able to do so. The District Court, however, has ruled that it is without power to entertain these claims.

This Petition for Certiorari is timely and in fact, necessary because at this time only the Ninth Circuit does not allow the District Courts within its jurisdiction the power to assume pendent jurisdiction over state claims against non-federal parties. The District Courts in every other Circuit do have this power.

II. THE ISSUE BEFORE THIS COURT IS NOT MOOT.

The sole issue before this court is a question of judicial power: whether the District Courts in the Ninth Circuit have less power to entertain claims than do District Courts in all of the other circuits. It is this question

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only that was raised on appeal to the court below and that this court is being requested to answer by the instant petition.

The merits of the pendent state claim involved is not before this court nor could it be, for the District Court did not consider it; the court simply held that it was prohibited from entertaining it.

The petitioner is ready to go into the District Court and argue the merits of her state claims, including the mootness question. It is her position that the merits of the claim, including the mootness allegation, are not as clear cut as respondent suggests and will require extensive briefing and argument, and include such questions as:

1. Do the facts constitute compliance with the claims statute? A question of substantial compliance.
2. Do the facts constitute estoppel?
3. Must this defense be affirmatively raised in the answer; a question of waiver.

The merits are not at issue before this court; and should certainly not be considered solely upon respondent's partisan view of them. Unless this court requires the Ninth Circuit to adopt the view of every other circuit that has considered this matter, the petitioner will lose the opportunity to present her cause of action solely because the venue of her case falls within the Ninth Circuit.

Respectfully Submitted,

Norman Rosenberg

NORMAN ROSENBERG
Spokane Legal Services Center
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Spokane, Washington 99201
Counsel for Petitioner

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Supreme Court, U. S.
FILED
DEC 24 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6521

MONICA ALDINGER,

Petitioner,

v.

MERTON L. HOWARD, individually and in his capacity as Treasurer of Spokane County, and

SPOKANE COUNTY, a public corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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NORMAN ROSENBERG
EXECUTIVE DIRECTOR

December 29, 1975

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DEC 31 1975
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SUPREME COURT, U.S.

Michael Rodak, Jr.
Clerk
Supreme Court of the
United States
Office of the Clerk
Washington, D.C. 20543

Re: Monica Aldinger v. Merton L. Howard, et al.,
No. 74-6521

Dear Mr. Rodak:

Upon reading the printed copy of the petitioners brief, it appears that a number of case citations are in error.

Citations in error:	Pages affected
American Security Co. v. Shatterproof Glass Corp., 166 F.Supp. 813 (D.C. Del. 1958) Correction: American Securit Co.	ii, 15
Baltimore S.S. Co. v. Phillips, 274 U.S. 361, 41 S.Ct. 600, 71 L.Ed. 1069 (1926) Correction: 47 S.Ct. 600	ii
Beautytuft, Inc. v. Factory Insurance, Assoc., 431 F.2d 112 (6th Cir. 1970) Correction: 431 F.2d 1122	ii
Connecticut General Life Insurance Co. v. Crofton, 415 F.2d 41 (5th Cir. 1969) Correction: Craton, 405 F.2d 41	iii, 30
Fahrner v. Gentzsh, 335 F.Supp. 349 (E.D. Pa., 1972) Correction: 355 F.Supp. 349	iii
Maloney v. United States, 354 F.Supp 48 (S.D. N.Y. 1972) Correction: 354 F.Supp. 480	iv

Moor v. County of Alameda, 41 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973) Correction: 411 U.S. 693	iv, 3, 5, 7

I hope that no inconvenience has been caused by the above errors.

Sincerely yours,

Norman Rosenberg
Attorney for Petitioner

NR/dr

cc: Garald Gesinger

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
ss.
COUNTY OF SPOKANE)

DEDE F. RUETSCH, being first duly sworn upon oath, deposes and says:

That on December 29, 1975, I served a true and correct manuscript copy of the letter above written upon respondents MERTON HOWARD and SPOKANE COUNTY, by depositing a copy of said document, postage prepaid, in a United States Post Office addressed to respondent's counsel of record, Donald C. Brockett, Spokane County Prosecuting Attorney. All parties required to be served have been served.

DEDE F. RUETSCH

SUBSCRIBED and SWORN to before me this 29th day of December, 1975.

Notary Public in and for the State of Washington, residing at Spokane

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IN THE

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OCTOBER TERM, 1975

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MONICA ALDINGER,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the court of appeals (App. 24) is reported at 513 F.2d 1257 (1975).

The one page order of dismissal by the district court for the eastern district of Washington entered September 25, 1973 (App. 20) is unreported.

JURISDICTION

The opinion of the court of appeals for the ninth circuit was entered on April 7, 1975. A petition for a rehearing *en banc* was denied on April 7, 1975. The petition for a writ of certiorari was filed on May 12, 1975, and was granted October 6, 1975. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

U.S. CONST. art. III, §2:

> Jurisdiction of Courts. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .

QUESTIONS PRESENTED

Does the U.S. district court for the eastern district of Washington have the power to join a pendent state

claim that is related to an existing federal claim, when such joinder requires the inclusion of a party not otherwise subject to federal jurisdiction?

STATEMENT OF THE CASE

In August, 1971, the petitioner was unlawfully and unconstitutionally terminated from her position in the Spokane County Treasurer's Office. As a consequence, petitioner filed a civil action pursuant to 42 U.S.C. §1983 against the Treasurer of Spokane County and against the County of Spokane. The complaint (App. 12) alleged, *inter alia,* the deprivation of certain enumerated constitutional rights and also asserted pendent jurisdiction over state law claims arising out of the same incident against the defendant Spokane County.

After various pre-trial matters of no importance to the issue on review, defendant Spokane County, citing *Moor v. County of Alameda,* 41 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), moved for judgment on the pleadings (App. 15), alleging that 42 U.S.C. §1983 did not empower jurisdiction over this corporate defendant. The district court granted the motion, dismissing the federal claim against the County of Spokane. The federal claim against the Treasurer, however, remained.

In granting the motion to dismiss, the district court ruled that it did not have the power to exercise pendent jurisdiction over *state law* claims against the defendant Spokane County, inasmuch as there was no independent basis of federal jurisdiction over this defendant. An order to that effect was entered on September 25, 1973 (App. 20).

The petitioner herein, citing *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d, 218 (1966), raised solely the pendent jurisdiction question on appeal to the court of appeals for the ninth circuit. The district court's ruling was affirmed by an opinion entered April 7, 1975 (App. 24).

SUMMARY OF ARGUMENT

The concept of joinder and the power of the court to provide complete relief and completely adjudicate claims is deeply rooted in traditional court systems. As early as 1824, Chief Justice Marshall, in the case of *Osborne v. Bank of the United States*, 22 U.S. (9 Wheat) 738, (1824) established that there was no constitutional bar toward extension of the Court's jurisdiction over a "whole case" even though it meant adjudicating related state claims. This case is considered to be the origin of pendent jurisdiction.

This rudimentary extension of federal court jurisdiction was given new vitality in the case of *Hurn v. Oursler,* 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148 (1933) although the Court therein imposed a very strict and severe test to determine the propriety of applying the doctrine. Various courts thereafter had a difficult time applying this test until the Congress eased their burden by enacting Section 1338(b) of the Judiciary Code which substituted a much simpler test to apply.

The next significant development of the doctrine of pendent jurisdiction occurred in the case of *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) wherein the Supreme Court urged the application of pendent jurisdiction in appropriate cases and encouraged the joinder of

"claims, parties, and remedies". *Gibbs*, however, did not specifically empower the joinder of parties over whom there was no independent basis of federal jurisdiction.

Since *Gibbs,* the courts of appeals of eight circuits have had occasion to rule on the "pendent party" question. Six of the eight courts of appeals have found little trouble allowing the common sense principles of *Gibbs* to resolve the pendent party question. The court of appeals for the ninth circuit, however, has steadfastly refused to budge from its pre-*Gibbs* position that pendent jurisdiction applied only to claims and not to parties. This controversy continued to produce expressed criticism by the circuits of one anothers' positions, culminating in the realization by the Supreme Court in *Moor v. County of Alameda,* 41 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973) that the ninth circuit stood virtually alone against the post-*Gibbs* trend in the courts of appeals.

Moreover, the various courts of appeals, in allowing the joinder of pendent plaintiffs and defendants in diversity cases, federal question cases, cases under Section 301 of the Labor Management Relation Act, admiralty cases, patent and copyright infringement cases, and civil rights cases, have given substantial justification and good reason therefor. Typical of these reasons is the following quotation from an eighth circuit court of appeals opinion, Mr. Justice Blackmun writing for the Court. "...in any event we find ourselves in sympathy with the third circuit approach for appropriate cases. It makes good sense; it avoids forum shopping; it tends to reduce costs for litigants; and it avoids the waste of already heavily burdened judicial time..." *Hatridge v. Aetna Casualty and Surety Co.*, 415 F.2d 809, 817 (8th Cir. 1969).

In the present case, which arises in the ninth circuit, considerations of judicial economy and fairness to the parties clearly dictate a reversal of the ninth circuit position, for, if the plaintiff is not allowed to present her claims against defendant Spokane County in the U.S. district court, she will be forced to file and to try another lawsuit in the Spokane County superior court that will be identical in every way to the pending suit in the U.S. district court, with one difference, the name of the defendant on the pleadings will be changed.

ARGUMENT

I.

INTRODUCTION

The jurisdiction of the Federal Courts was created and limited by the U.S. Constitution.[1] The courts cannot exceed the jurisdictional grant contained in the Constitution and implemented by statutes enacted by Congress, and Congress, also, is limited by the constitutional grant of authority and cannot, by statute, confer greater jurisdiction on the federal courts than is contained therein.

The judicially created doctrine of pendent jurisdiction, and ancillary jurisdiction to which it bears substantial analogue,[2] are traditional devices used to expand the jurisdiction of the Courts when necessary to preserve the court's effectiveness as well as to conduce

[1]U.S. CONST. art. III, §2

[2]See Claster. *"Pendent and Ancillary Jurisdiction: Towards a synthesis of 2 doctrines."* 22 UCLA L.Rev. 1263.

fairness to parties,[3] and have found a secure place in modern jurisdictional rules.

In *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d, 218 (1966), the U.S. Supreme Court, responding to confusion caused by earlier decisions, explained and simplified the application of the doctrine of pendent jurisdiction. The Court did not, however, make a definitive statement as to whether or not pendent jurisdiction could be asserted over a party over whom there was no independent basis of federal jurisdiction.

In *Moor v. County of Alameda*, 41 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), this Court underlined, but did not resolve, this perhaps inadvertent omission in the comprehensive *Gibbs* opinion. The significant omission has since been remedied by interpretations of eight of the circuit courts of appeals, all but two of which have ruled that the concept of pendent jurisdiction contemplates and allows the joinder of parties when appropriate.

While the *Moor* opinion suggests that this is a "subtle and complex question with far ranging implications" (411 U.S. at 715, 93 S.Ct. at 1798), the history and development of the judicially created doctrine of pendent jurisdiction, and its close relative ancillary jurisdiction, make the resolution of this question quite apparent, as a brief historical analysis indicates.

[3]The original purpose of Ancillary Jurisdiction appears to have been to preserve property before the court to allow all who had a claim to that property a forum in which to present that claim.

II.

THE HISTORY AND DEVELOPMENT OF THE DOCTRINE OF PENDENT JURISDICTION CLEARLY INDICATES THAT THERE IS NO CONSTITUTIONAL NOR STATUTORY BAR TO THE EXTENSION OF THE DOCTRINE TO INCLUDE THE JOINDER OF PARTIES. . . .

Modern jurisdictional rules evolved from practices developed in the royal courts of medieval England, the courts of Common Pleas, Exchequer, and King's Bench. As these courts evolved, they became very specialized and each exercised jurisdiction exclusively over certain types of actions. The means by which the jurisdiction of the court was evoked was by the use of the royal writs. Application was made to Chancery which would issue a writ directing one of the courts to entertain the particular cause of action specified in the writ.

In time, many of the writs became regularized in form and were automatically issued when a particular type of dispute arose. They became accepted as defining the limits of the particular cause of action. When, however, a situation arose which did not fall within one of the standardized writs, the Chancellor, at his discretion, could either refuse to issue a novel writ or could do so to meet the new situation.

Because a common law suitor, under this system, was required to define his cause of action in terms of an existing writ or the court would be without jurisdiction to grant relief, the Court of Chancery developed into a court of equity which would entertain actions without regard to form.

Except for a few specific situations, joinder of parties was not permitted under the common law and joinder

of claims was limited to such claims as, considered separately, could be maintained under the form of the writ chosen. Equity, however, developed a series of devices by which the scope of litigation could be appropriately enlarged in certain situations. These were the rules regarding necessary parties, intervention, class suits, and impleader.[4]

Equity permitted much freer joinder of parties and of claims. As long as the parties were before it, equity could grant whatever relief the situation warranted. This enabled a court of equity to dispose of a complex, involved controversy in one proceeding whereas multiple suits would be necessary at law.

> Where equity has acquired jurisdiction of a case, it may decide all matters incidentally connected with it so as to make a final determination of the whole subject. Story, EQUITY JURISPRUDENCE (14th ed. 1918), Ch. 1 §33 p.30.

The joinder rules of equity developed into the doctrine of ancillary jurisdiction. This doctrine was first enunciated by the U.S. Supreme Court in *Freeman v. Howe,* 65 U.S. (24 How.) 450 (1860). The *Freeman* Court held that, to prevent injustice, it could exercise jurisdiction over an ancillary suit which was supplementary to or dependent upon the original suit out of which it arose.[5]

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[4]See RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES, 230 U.S., Appendix III.

[5]The case involved a suit in a federal court by the creditors of a railroad against the railroad. The creditors obtained a judgment, and a writ of attachment was issued and executed by a federal marshall. The marshall levied on certain railroad cars belonging to the railroad. A suit by the mortgagees of the cars was begun in state court to enjoin the federal marshall from proceeding further. The court held that the state suit could not be maintained because it had exclusive jurisdiction over the res, but it would consider the claim of the mortgagees as an ancillary claim to the original debt action.

Freeman was an example of a situation in which the court exercised ancillary jurisdiction to preserve the security of property over which it had jurisdiction. Fairness dictated that all parties claiming an interest in the property be provided a forum in which to test their claims. To rule otherwise, the claimant would be unable to assert his claim to the res while it remained under the control of the federal court and would be relegated to a pursuit of the property after its disposal according to court order.

Another purpose served by ancillary jurisdiction was to insure that all claims to a particular res were completely litigated by the court's decision. The court had an interest in providing complete relief when its jurisdiction was invoked. See, *Root v. Wentworth*, 150 U.S. 401 (1893); *White v. Ewing*, 159 U.S. 36 (1895); *Alexander v. Hillman*, 296 U.S. 222 (1935).

In 1926, the Court went further. In *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926), the Court held that once a federal court took cognizance of an ancillary claim, it had jurisdiction over that claim even though the jurisdiction-granting federal claim had been dismissed on its merits. The Court felt that the defendant was not in court by his own choice and, in fairness to him, should be provided with a forum in which to present his related counterclaim.

With the adoption of the Federal Rules of Civil Procedure in 1938, these doctrines were significantly expanded. Ancillary jurisdiction was applied to compulsory counterclaims under Rule 13(a), cross-claims under Rule 13(g), and third party claims under Rule 14.

Paralleling the development of the doctrine of ancillary jurisdiction was the doctrine of pendent

jurisdiction. This doctrine is said to have originated in the decision rendered by Chief Justice Marshall in *Osborne v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). This case established that the federal courts had the power to entertain questions outside the jurisdiction conferring claim before the court, Justice Marshall insisting that the jurisdiction of the court extended to "a whole case"[6] rather than to "parts of cases" or "to a single question" or "insulated point" in the case. *Id.* at 822.

The *Osborne* Court was presented with a question involving the federal statute which created the United States Bank. However, in order to decide the controversy, the Court also had to consider matters of state law. The Court held that the jurisdiction of the federal courts extended not only to federal issues themselves, but also to nonfederal issues essential to the settlement of the federal claim. Justification for this holding was found within article III of the Constitution wherein the jurisdiction granted to the court extends to "cases and controversies." By exercising its power in this way, the federal court is merely deciding a case which incidentally contains both federal and nonfederal questions. To not do so would arbitrarily prohibit the federal courts from adjudicating cases simply because a non-federal question was incidentally involved.

The first noteworthy application of this doctrine occurred in *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175 (1909). The court there upheld the power of a district court having jurisdiction to decide the

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[6]What is "a whole case"? See Shulman and Jaegerman, *Some Jurisdictional Limitations of Federal Procedure*, 45 Yale L. J. 393, 406 N.47 (1936).

constitutionality of a Kentucky statute setting up a railroad commission, to bypass the constitutional question and to decide the case on the basis of the pendent state claim regarding the validity of state railroad rate schedules. The court ruled on the state claim even though it declined to rule on the federal question. The court cautioned: "Of course, the Federal question must not be merely colorable or fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction." 213 U.S. at 191.

In both *Osborne* and *Siler*, the power found by the court was used to give complete relief in the case before it. Used in this way, pendent jurisdiction did not differ significantly from ancillary jurisdiction. In both instances, the Court feld that, to grant complete relief, it was justified in deciding the state claims.

The next significant treatment of the doctrine occurred in *Hurn v. Oursler*, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148 (1933),[7] wherein the court considered matters of procedural convenience in measuring the scope of the federal action.

The *Hurn* Court blurred the distinction between ancillary and pendent jurisdiction, relying on Equity Rule 30, Federal Equity Rules of 1912, 226 U.S. app., and cited *Moore v. New York Cotton Exchange, supra,*

[7]Hurn involved a federal claim based upon infringement of copyright and a state claim based upon unfair competition. The lower court dismissed the state claim for lack of jurisdiction, but decided the federal claim. The Supreme Court held that where two grounds, one federal, the other non-federal, are urged in support of *the same cause of action*, a federal court has jurisdiction to adjudicate both grounds, providing, of course, that the federal ground is substantial. The underlying policy reasons were judicial economy and convenience.

and *Ludwig v. Payson Manufacturing Co.*, 206 F. 60 (1913), a similar patent infringement case.

Hurn was typical of the majority of cases dealing with pendent jurisdiction. Most, like *Hurn*, involved actions based on the patent, copyright, and trademark laws, in which a nonfederal claim of unfair competition was joined with the federal claim of infringement. The various circuits had developed conflicting views of the allowable scope of jurisdiction, and the *Hurn* Court apparently intended to resolve these conflicting lines of decisions.

The test in *Hurn* for the type of claim cognizable under pendent jurisdiction was based upon a "single cause of action" concept. This immediately proved unwieldy and confusing due to the difficulty in arriving at a definition of the concept. The difficulty was expressed by Justice Sutherland who wrote the *Hurn* opinion. At one point in the opinion, he noted that a single cause of action existed when all legal rights were based on identical facts: 289 U.S. at 246, 53 S.Ct. at 590. He later stated that facts merely reveal when some right has been infringed, and that a single cause of action is established when there is a violation of but one right by a single legal wrong. 289 U.S. at 246, 53 S.Ct. at 590.

The "test" included a significant distinction; while a federal court is not empowered "... to assume jurisdiction of a separate and distinct nonfederal cause of action because it is joined in the same complaint with a federal cause of action ..." nevertheless, a

> "... distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two

> separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the nonfederal ground; in the latter, it may not do so upon the nonfederal cause of action."
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> 53 S.Ct. at 589.

The post-*Hurn* cases tended to take a rather strict[8] view of this rule. In *Musher Foundation v. Alba Trading Co.*, 127 F.2d 9 (2d Cir. 1942), the majority held that in order for it to entertain a nonfederal claim, there must be complete identity of facts between the nonfederal and federal claims. The dissent felt that the doctrine set forth was illusory, ". . . unless we grant a reasonable and practical content to the yardstick and require for our unitary cause only a substantial amount of overlapping testimony . . . A converse view, requiring identity of facts, practically excludes the possibility of a single cause, since state and federal rights are hardly ever—if ever—complete equivalents, and differing rights depend on differing facts." 127 F.2d at 11.

The strict, virtually unworkable interpretation of the term "single cause of action" resulted from the indefiniteness of the *Hurn* test. Few courts were certain

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[8]For a rather critical pre-*Gibbs* view of the development of pendent jurisdiction see: *Pendent Jurisdiction: An Expanding Concept in Federal Court Jurisdiction*, 51 Iowa L. Rev. 151 (1965). A more moderate pre-*Gibbs* view is expressed in *"The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts*, 62 Columbia L. Rev. 1018 (1962).

of its precise boundaries and found that the test was often easier to state than to apply. *American Security Co. v. Shatterproof Glass Corp.*, 166 F. Supp. 813 (D.C. Del. 1958).

In the midst of this confusion, Congress, in 1948, enacted the Judiciary Code, which gave the federal courts exclusive jurisdiction over patent, copyright, and trademark actions. 28 U.S.C. §1338(b) provides that:

> The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, or trademark laws.

The revisor's notes, 80th Congress House Report No. 308, (1947), stated that this section was "intended to avoid 'piecemeal' litigation to enforce common-law and statutory copyright, patent, and trademark rights by specifically permitting such enforcement in a single civil action in the district court." The notes cited and specifically referred to the majority and dissenting opinions in both *Hurn* and *Musher*.

The reference to *Hurn* has suggested to various commentators that in enacting §1338(b), Congress intended to codify the doctrine of pendent jurisdiction as stated in *Hurn*. Reference also to *Musher* indicates that this is not likely. *Musher* typified the problems posed by *Hurn* and the conflicting interpretations that the "single cause of action" test was subject to. The fact that Congress cited both cases indicates that it was well aware of the difficulty experienced by the courts.

In order to clarify the doctrine for the courts, Congress discarded the "single cause of action" test and substituted for it instead the phrase, "a substantial and related claim." This indicates a clear intent on the part

of Congress to reject the *Musher* majority's interpretation of *Hurn* and to eliminate the confusion created by an undefinable test.

Rejection of the "single cause of action" test allowed the courts considerable flexibility to extend the doctrine of pendent jurisdiction. This much more liberal interpretation was adopted later by the Supreme Court in *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

It is also clear that Congress did not intend to limit the scope of the doctrine of pendent jurisdiction to patent, copyright, and trademark cases. However, because most cases in which a pendent question arose were in the area of patent/copyright/trademark law, Congress was attempting to resolve a problem that was creating a great deal of confusion.

It cannot, however, be construed that Congress intended to strictly limit the application of pendent jurisdiction to this area. As indicated above, Congress not only intended to resolve a particular problem, but, by its choice of words, intended to liberalize the doctrine itself. Had it been the desire of Congress to limit the scope of the doctrine, it could have indicated with specificity, the kinds of cases to be considered. It did not do so.[9]

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[9]This view of Congressional intent has been uniformly adhered to by every court that has been called upon to consider the question. In *Strachman v. Palmer,* 177 F.2d 427 (1st Cir. 1949), the concurring opinion of Judge Magruder stated:

> [T]he enactment of this §1338(b) hardly warrants the inference that Congress intended that the pendent jurisdiction of the federal courts, as enumerated in *Hurn v. Oursler,* is to be confined to the special classes of cases enumerated in this subsection.

See also, *Jenn-Air Products Co. v. Penn Ventilator, Inc.,* 283 F. Supp. 591 (D.C. Penn. 1968); *American Foresight of Phila.,*

Further, since the enactment of §1338(b) in 1948, the courts have applied the doctrine of pendent jurisdiction to a wide variety of cases not limited to the patent, copyright, or trademark field. If inferences can be drawn from Congressional action, similar inferences can be drawn from its inaction. Congress has obviously been aware of the growth and development of pendent jurisdiction since 1948. Yet, not one legislative enactment has occurred to curb the liberal use of the doctrine nor has Congress attempted to limit its use to the patent and copyright field. This can only be construed as tacit approval of its development and reinforces the theory that Congress intended a liberalization of the doctrine.

The major distinction that remained between ancillary and pendent jurisdiction was that ancillary jurisdiction was primarily to be exercised by defendants while pendent jurisdiction was used for the convenience of the court and the plaintiff. Ancillary jurisdiction emerged for the protection of the defendant who was not voluntarily in the forum; fairness dictated that he be allowed to assert related claims and bring in related parties. Pendent jurisdiction, on the other hand, originated not because of fairness, but in the interest of judicial economy.

The case of *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), cleared up much of the confusion created by the distinction between ancillary and pendent jurisdiction. First, the Court broadened the scope of claims available for joinder, and second, it clarified the fact that the only

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Inc. v. Fine Arts Sterling Silver, 268 F. Supp. 656 (D.C. Penn 1967); *Caldwell-Clements, Inc. v. McGraw-Hill Pub. Co.,* 12 F.R.D. 403 (D.C. N.Y. 1952); *Kaz Manufacturing Co. v. Chesebrough-Ponds, Inc.,* 211 F. Supp. 815 (D.C. N.Y. 1962).

real distinction between ancillary and pendent jurisdiction was the amount of discretion involved.

The *Gibbs* Court noted that the *Hurn* "single cause of action" test was formulated before the unification of law and equity that came with the adoption of the federal rules of civil procedure, and that under these rules, the impulse was toward entertaining the broadest possible scope of action consistent with fairness to the parties. Joinder of claims, parties, and remedies was strongly encouraged. 383 U.S. at 722, 86 S.Ct. at 1137. The *Gibbs* Court then defined a new standard for determining when a pendent claim should be considered:

> The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then assuming substantiality of the federal issues, there is power in federal courts to hear the whole.

This new standard insured a far more liberal application of pendent jurisdiction. The Court recognized that, in terms of types of claims that could be considered, there was actually no difference between ancillary and pendent jurisdiction. This was not a new concept but it was one that had been lost when *Hurn* narrowly, and unnecessarily grudgingly, defined the claims cognizable under pendent jurisdiction. The Court in *Gibbs* however, retained the primary distinction between ancillary and pendent jurisdiction by stating at several points "that pendent jurisdiction is a doctrine of discretion, not of plaintiffs right," 383 U.S. at 726, 86 S.Ct. at 1139, and urged that the district courts exercise caution not to abuse that discretion.

III.

SINCE THE VERY STRONG ENCOURAGEMENT ENUNCIATED IN *UNITED MINE WORKERS V. GIBBS*, THE OVERWHELMING MAJORITY OF FEDERAL COURTS HAVE ALLOWED THE JOINDER OF PENDENT PARTIES AS WELL AS CLAIMS. . . .

Gibbs did not specifically deal with a "pendent party" situation. Its holding, however, has provided the starting point for the expansion of the doctrine of pendent jurisdiction to pendent parties. The important language of *Gibbs* on the issue of judicial power, which has been specifically cited by many circuit and district court decisions allowing joinder of pendent parties, is as follows:

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ." U.S. Const., Art. III, Sec. 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case". The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. . . . The state and federal claims must derive from a common nucleus of operative fact. But, if considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal courts to hear the whole. 383 U.S. at 725, 86 S.Ct. at 1138 (citations omitted).

Although, the issue now under consideration is properly narrowed to the "pendent party" question, despite the

lack of a specific Supreme Court ruling, the common sense of *Gibbs* and its progeny clearly indicate that joinder of parties, as well as claims, is empowered when, in the discretion of the district court, it is warranted by the facts.

A. Many Courts of Appeals Have Recognized The Existence Of Power To Join Pendent Parties. . . .

The circuit courts of appeals for the second, third, fourth, fifth, sixth and eighth circuits have all held that the broad language of *Gibbs* permits the assertion of federal jurisdiction over additional parties who were not involved in the federal claim and whose sole connection with the case stemmed from the pendent state law claim. The doctrine has been invoked by these courts in a variety of different situations including joinder of pendent parties, both defendants and plaintiffs in diversity cases, federal question cases, admiralty cases, cases under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, patent infringement cases, copyright infringement cases, cases under the Interstate Commerce Act, 49 U.S.C. §20, and civil rights cases. Thus, pendent jurisdiction is not unique to any one particular type of case. Pertinent language from these decisions is as follows.

The Second Circuit

In *Almenares v. Wyman,* 453 F.2d 1075 (2d Cir. 1971), *cert. denied* 405 U.S. 944 (1971), the plaintiffs stated a federal claim under 28 U.S.C. §1343(3) and 42

U.S.C. §1983 against the city welfare commissioner for termination of their AFDC grants without a due process hearing. The plaintiffs' second claim was against the state, alleging that the state's review procedures regarding reduction or termination of AFDC grants were in conflict with HEW prescribed procedures. The court relied upon prior decisions and also upon *Gibbs* to find the state law claim to be properly pendent to the Constitutional claim against the city commissioner.

> For as we have recently held, the doctrine of pendent jurisdiction is sufficiently broad to support a claim within the limits of *Gibbs* against a person not a party to the primary, jurisdiction-granting claim. See *Astor-Honor, Inc., v. Grosset & Dunlap, Inc.*, 441 F.2d 627 (2d Cir. 1971); *Leather's Best, Inc. v. S.S. Mormaclynx,* 451 F.2d 800 (2d Cir. 1971), at 809.
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> 453 F.2d at 1083.

Continuing the application of the pendent theory to the case before it, the court of appeals ruled that the district court also had power to join all the plaintiffs in the action on the pendent statutory claim against the state since the claims of the plaintiffs and all the members of their class derived from a common nucleus of operative facts.

> This is sufficient to vest the court with subject matter jurisdiction not merely over their primary claim, but also over their own pendent claims–all those arising from the "common nucleus of operative facts"–whether against the defendant to the primary claim or another. We see no valid distinction in the *power* of the court to join additional plaintiffs. (Emphasis the courts.)
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> 453, F.2d at 1084.

Continuing to discuss the power of a federal district court to hear pendent claims, the court, in a footnote, stated the following.

> Clearly, as a *constitutional* matter, the court has the power to permit this. While the pendent claim here is federal and thus within one of the constitutional heads of jurisdiction, the same result would follow even if the pendent claim presented a question of state law and diversity of citizenship was absent. Chief Justice Marshall in *Osborne v. Bank of the United States,* 22 U.S. (9 Wheat) 738, 821-22, 6 L.Ed. 204 (1824), interpreted the *constitutional* scope of a "case" as including all questions, state or federal. . . . The presence of additional parties over whom federal jurisdiction would not otherwise exist does not change this. (citations omitted.)
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> 453 F.2d at 1084, fn. 12.

Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971) involved an action for copyright infringement, unfair competition, unfair trade practices. The district court had dismissed the claim against one of several defendants because it held it was a state tort claim for unfair competition even though, as the second circuit court of appeals noted, it also stated a claim within 28 U.S.C. §1338(b) for unfair competition. In so dismissing, the district judge relied on "... the general proposition that a state claim against one defendant cannot append to a federal claim against another . . ." 441 F.2d at 629. In disagreeing with the trial court on this question, the court of appeals held that it could have exercised jurisdiction over the state claim.

> There are indeed many statements supporting 'the general proposition' enunciated by the district

> court, notably, for our purposes, that in *Wasserman v. Perugini,* 173 F.2d 305, 306 (2 Cir. 1949), where this court declared that in the absence of diversity, a federal court did not have jurisdiction over individual defendants on a state tort claim arising from the same incident which was the basis of a separate count against the United States under the Federal Tort Claims Act. However, "cases antedating (citation omitted) that denied judicial power, i.e., jurisdiction over the pendent claim, are suspect as authority." 3A Moore, FEDERAL PRACTICE, 18.07 (1-4) (1974). The *Gibbs* Court described the proper test of pendent jurisdiction as follows, 383 U.S. at 725, 86 S. Ct. at 1138:
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> > The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.
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> . . . . A plaintiff with claims against three alleged conspirators for the same set of acts "would ordinarily be expected to try them all in one judicial proceeding," assuming that all defendants were subject to the process of the court. It would be an unjustifiable waste of judicial and professional time–indeed, a travesty on sound judicial administration–to allow Astor to try its unfair competition claim against Buckley and Bantam in federal court but to require it to prosecute a claim involving precisely the same facts against Grosset "in a State court a block away." The absence of any constitutional barrier to entertaining a sufficiently related state claim against a person who was not a party to the federal claim was recognized, prior to *Gibbs,* in cases involving

compulsory counterclaims under F.R. Civ. P. 13(a), (citations omitted), and third-party claims under F.R. Civ. P. 14, (citations omitted). The only post-*Gibbs* court of appeals decision that has been called to our attention which involved the joinder as defendants of persons not parties to the claim supporting federal jurisdiction is *Williams v. United States*, 405 F.2d 951, 955 (9 Cir. 1969). This presented the same problem as this court had faced, long before *Gibbs*, in *Wasserman v. Perugini, supra*, namely, the joinder of defendants as to whom there was no diversity with a claim for the same injury against the United States under the Federal Tort Claims Act. Although the *Williams* court approved the district court's dismissal of these defendants, we are not at all sure we would agree with this insofar as the decision rested on a general theory of lack of power.

441 F.2d at 629-30.

The court acknowledged that *Gibbs* did not deal with pendent parties but with claims. However, it felt the principles there enunciated applied equally to joinder of parties.

> Although the pendent claim in *Gibbs* did not include a party not named in the federal claim, Mr. Justice Brennan's language and the common sense considerations underlying it seem broad enough to cover that problem also.
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> *Id.* at 629.

Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971) was an action in admiralty for contract damages because of a lost container and also tort damages against the bailee of the container under state law. The court of appeals again referred to its prior decisions interpreting *Gibbs* and allowed the

district court to exercise jurisdiction over the state claim as well as the admiralty claim. The court dealt with the apparently novel ingredient of a claim in admiralty, stating that

> . . . the constitutional rationale which underlies the doctrine of ancillary jurisdiction and Rule 14 may be applied to support the conclusion that a federal court has the power to hear a related state claim against a defendant not named in the federal claim regardless of whether the federal claim arises in the civil or admiralty jurisdiction. Thus, we conclude that in a case such as this, where the facts underlying the state and federal claims are identical, a federal court vested with admiralty jurisdiction over a shipper's claim against the carrier for breach of contract of carriage, does have the "power" also to entertain its state tort claim against a pier operator.
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> 451 F.2d at 810-11.

The Third Circuit.

The court of appeals for the third circuit has decided the issue of joinder of pendent parties similarly to the court of appeals for the second circuit.

In *Wilson v. American Chain & Cable Co.*, 364 F.2d 558 (3d Cir. 1966), a father's consequential damages claim against the manufacturer of a riding mower, from which his child fell and sustained cuts, was considered ancillary to the child's claim for injuries and both were allowed to be litigated in one suit. The court's reasoning was based on application of the doctrine of pendent jurisdiction. Speaking of the trial court's dismissal of the father's claim, the court said:

There is, moreover, a more fundamental error in the dismissal of the father's claim for lack of jurisdiction, although it was not raised below or here. The father's claim is not independent from the claim which he made on behalf of his minor son, for the father's damages flowed to him from the injury which the son suffered and are ancillary to the son's claim.

364 F.2d at 564.

In these circumstances it seems to us both appropriate and right to apply the doctrine of pendent jurisdiction, by which a claim cognizable in the federal courts may be permitted to carry with it a claim otherwise not within the federal jurisdiction, if both claims ordinarily would be tried in one judicial proceeding. (citation to *Gibbs* omitted.)

The usual case of pendent jurisdiction involves one plaintiff. Although the present case involves two plaintiffs, one the minor and the other the father in his own right, both these claims arise from the same occurrence . . . We have already recognized the principle where diversity of citizenship existed in a survival action by permitting an accompanying wrongful death action in which diversity of citizenship was lacking, to be maintained as pendent to it. (Citations omitted.) It is equally applicable to cases such as this where the diversity requirement or the amount in controversy is present in one but absent in the other of the two related claims of parent and child.

Id.

While *Wilson* espoused adding a pendent plaintiff, a later third circuit court decision applied the doctrine of pendent jurisdiction to allow federal jurisdiction in a diversity action over a pendent defendant even though the claim against this defendant was less than $10,000.

Jacobson v. Atlantic City Hospital, 392 F.2d 149 (3d Cir. 1968), was a malpractice action against a hospital and two doctors under the New Jersey Death Act. The court of appeals held that there was a sufficiently close relationship between the hospital and at least one of the doctors and that convenience would be better served by trying in a single suit the claims for the death of a party who fell out of a hospital bed. Discussing its own application of pendent jurisdiction to hear such claims and referring to *Gibbs* as supportive of this extension of the original pendent concept, the Court said:

In recent years, this court has taken the lead in recognizing diversity jurisdiction over an entire lawsuit in tort cases presenting closely related claims based, in principal part at least, on the same operative facts and normally litigated together, even though one of the claims, if litigated alone, would not satisfy a requirement of diversity jurisdiction.

392 F.2d at 153.

Finally, this view of the scope of diversity jurisdiction where related claims are joined in a single lawsuit, finds significant analogical support in *United Mine Workers v. Gibbs,* 1966, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218, although federal question jurisdiction was involved there. That case liberalized the concept of so-called pendent jurisdiction "where two distinct grounds in support of a single cause of action are alleged, only one of which presents a federal question."

392 F.2d at 155.

Continuing to refer to *Gibbs,* the Court said:

The Court then urged hospitality toward requested adjudication of both federal and state claims that

"derive from a common nucleus of operative fact," particularly where "considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding . . ."

392 F.2d at 155.

Concluding, the Court said:

> These considerations seem as applicable to cases in which federal jurisdiction is based on diversity of citizenship as to federal question cases. We have given them effect in past diversity cases and we do so here.
>
> 392 F.2d at 155.

The Fourth Circuit.

The court of appeals for the fourth circuit follows the second and third circuit's recognition of the power of federal courts to exercise pendent jurisdiction to join parties, as is exemplified in *Stone v. Stone*, 405 F.2d 94 (4th Cir. 1968). That decision involved a settlor's action against a beneficiary under a trust and the beneficiary's mother for the tortious refusal to endorse stock certificates. In allowing the claims to be joined through the exercise of pendent jurisdiction, the court followed both the third circuit's approach in *Jacobson* and that of the Supreme Court in *Gibbs*.

> Thus, in multi-claim diversity cases, the Third Circuit treads the path recently blazed by the Supreme Court in *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218, where guidelines were announced for the proper handling of state claims in *federal question* cases.
>
> 405 F.2d at 97.

Discussing the difference between diversity cases and federal question cases for the purpose of applying the doctrine of pendent jurisdiction, the Court said:

> An apt analogy between the two is, however, at once apparent. In each situation, the federal court has before it a claim which clearly satisfies the requirements of Section 1331 or Section 1332, and in each instance the plaintiff asserts an additional claim which, if litigated alone, would not satisfy a jurisdictional requirement. Otherwise stated, the question in both the federal question area and the diversity area is whether a federal court may exercise jurisdiction over a claim which, standing alone, would not meet the jurisdiction test.
>
> We find the force of the analogy most compelling and therefore adopt the approach enunciated by the Supreme Court in *Gibbs*. . . .
>
> 405 F.2d at 97.

The court recognized *Gibbs'* discussion of the "power" of federal courts to exercise pendent jurisdiction and included the following statement.

> We find significance in the Court's emphasis on whether the "entire action" may be viewed as "but one constitutional 'case'," and are persuaded, as the Third Circuit was persuaded, that the same question should be asked in multi-claim diversity cases. If the entire lawsuit before us may be viewed as a single constitutional "case", the District Court could have taken jurisdiction over the claim against the grandson as well as the claims against the mother.
>
> 405 F.2d at 98.

The Fifth Circuit.

The fifth circuit court of appeals too, has considered and approved the exercise of pendent jurisdiction to

join claims against two separate defendants which arose out of the same factual situation. In the case of *Connecticut General Life Ins. Co. v. Crofton,* 415 F.2d 41 (5 Cir. 1969), a union and individual union members brought an action against the employer and an insurance carrier under the Labor Management Relations Act, 29 U.S.C. §185, to determine the rights to insurance coverage arising out of a collective bargaining agreement. Although having jurisdiction over the employer, the court noted a possible statutory jurisdictional problem involved in its taking jurisdiction over the claim against the insurance carrier because of the limitations in the statute over suits for violation of contracts between employers and labor organizations.

> When a union and individual union members seek relief against an insurance carrier not their employer, is such an action any longer a suit for the violation of a contract between an employer and a labor organization as required by Section 301 of the Labor Management Relations Act?
>
> 405 F.2d at 48.

After discussing prior cases dealing with a similar problem, the court resolved the question by invoking its power to exercise pendent jurisdiction over the claims against the insurance company.

> It may be that the scope of Sec. 301 is sufficiently broad to include within its coverage the declaration of rights under insurance policies which arise out of the collective bargaining process. However, the present case does not call for such a determination since the *power* of the district court over Connecticut General is here supportable under the doctrine of pendent jurisdiction. Since it could not be said that the federal labor claim involved in this case was obviously without merit, or clearly foreclosed by prior Supreme Court decisions, or

> should have been dismissed on the pleadings alone without presentation of evidence, the fact that the claims under the insurance contract and the collective bargaining agreement originated in a "common nucleus of operative fact," gave the district court pendent jurisdiction over Connecticut General irrespective of the dimensions of Sec. 301. (Citations omitted.) Given the amount of judicial time and energy already expended in this case, we think the strong and practical policies undergirding the pendent jurisdiction doctrine require that in this instance the rights of union members in their group insurance policy be determined by a federal forum. (emphasis supplied)
>
> 405 F.2d at 48.

The Sixth Circuit.

The court of appeals for the sixth circuit considered the pendent party question in *Beautytuft, Inc. v. Factory Insurance Association,* 431 F.2d 1122 (6th Cir. 1970). That case was a diversity action under 28 U.S.C. §1332 by three carpet manufacturers on fire insurance policies for business losses resulting from fires. The issue before the court was whether it had jurisdiction over 24 of 58 insurance company defendants whose contract liability was less than the $10,000 jurisdictional amount required by Sec. 1332. Finding that the district court had properly taken jurisdiction over these defendants, the court said:

> . . . the claims arise out of the same transaction and the proofs required (except as to amount of liability) are identical in every respect. Clearly, in the interest of avoiding sheer waste of court time, these claims should be tried together. We believe

> the District Judge was entirely correct in asserting pendent jurisdiction as to the 24 defendants.
>
> 431 F.2d at 1128.

A similar situation was involved in *F. C. Stiles Contracting Co. v. Home Insurance Co.*, 431 F.2d 917 (6th Cir. 1970). In that case, a diversity action against multiple defendants on value reporting fire policies, one defendant moved to dismiss the action as to them since the claim against them was less than the $10,000 jurisdictional amount. The court affirmed the district court's denial of the motion by referring to *Gibbs'* power theory.

> However, in the present controversy the required jurisdictional amount is satisfied against Home Insurance. Thus, the rationale used in pendent jurisdiction cases, notably *United Mine Workers v. Gibbs,* (citation omitted) is applicable by analogy to the present situation. This would allow a plaintiff to adjudicate in a single federal forum a claim against a diverse defendant which does not meet the necessary jurisdictional amount if it is properly joined with a claim against another defendant which meets all the necessary jurisdictional requirements, provided that both claims are part of the same controversy.
>
> 431 F.2d at 919.

Patrum v. City of Greensburg, Kentucky, 419 F.2d 1300 (6th Cir. 1969), is a decision of the court of appeals which was previously been relied upon by the court of appeals for the ninth circuit as a rejection of the doctrine of pendent jurisdiction. The ninth circuit court of appeals has since realized their misplaced reliance (App. 29, fn.2) because this case indeed acknowledged that federal courts have "power" to join pendent parties as well as to hear pendent claims. The

Patrum court, noting the often quoted language of *Gibbs* about the "power" of federal courts to hear state claims which derive from a common nucleus of operative fact with the federal claim, allowed the district court to decide, as a matter of discretion, not to exercise this power in the action before it. What the court of appeals said was:

> We read the decision of the Supreme Court in *Gibbs* as indicating: (1) The decision to exercise the power of the doctrine of "pendent jurisdiction" lies within the discretion of the trial court . . .
>
> 419 F.2d at 1302.

Thus, the sixth circuit has recognized the "power" of federal courts to hear pendent claims and to join pendent parties, and reiterated that the doctrine of pendent jurisdiction is in fact, a discretionary doctrine to be exercised as appropriate by the trial court.

The Seventh Circuit.

The court of appeals for the seventh circuit has dealt with this issue only once since the holding in *Gibbs*. *Hampton et al. v. City of Chicago et al.*, 484 F.2d 602 (1973). The court held that the district court lacked power to join claims against a non-diverse defendant. The opinion did not, at any point, refer to or cite *Gibbs,* but relied for authority solely upon the pre-*Gibbs* case of *Wojtas v. Village of Niles,* 335 F.2d 797 (7th Cir. 1964), *cert. denied* 379 U.S. 964, 85 S.Ct. 655, 13 L.Ed. 558 (1965) and is, thus, less than a thorough analysis of the issue.

The Eighth Circuit.

The primary decision on the pendent party question in the eighth circuit is *Hatridge v. Aetna Casualty & Surety Co.*, 415 F.2d 809 (8th Cir. 1969). There the court of appeals reasoned that a wife's claim for loss of consortium was contingent on the success of her husband's claim for personal injuries suffered when a bus overturned and was so intertwined with it that her claims against the separate parties were allowed to be joined under the theory of pendent jurisdiction. Mr. Justice Blackmun wrote the decision for the court.

> Although *Gibbs* concerned claims possessed by a single plaintiff, the decision clearly indicates that "there is *power* in federal courts to hear the whole." 383 U.S. at 725, 86 S.Ct. at 1138.
>
> 415 F.2d at 816-817.

After referring to cases decided by the third circuit court of appeals and contrasting them with those decided by the ninth circuit court of appeals, the court opted in favor of the third circuit view.

> The Ninth Circuit decision hangs upon a case decided 29 years ago, long prior to *Gibbs* but subsequent to *Hurn v. Oursler*, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148 (1933), where the doctrine of pendent jurisdiction, although not referred to by that name, was given some vitality.... In any event, we find ourselves in sympathy with the Third Circuit approach for appropriate cases. It makes good sense; it avoids forum shopping; it tends to reduce costs for litigants; and it avoids the waste of already heavily burdened judicial time. We feel that a consortium suit, in the light of its stated character under Arkansas law, is ideal for the application of the doctrine. We apply pendent jurisdiction as a supportive ground for our conclusion here.
>
> 415 F.2d at 817.

The final court of appeals decision to be discussed will be *Schulman v. Huck Finn, Inc.*, 472 F.2d 864 (8th Cir. 1973). Involved there was a claim for damages for patent infringement and unfair competition through misappropriation of trade secrets. Though the infringement claim was dismissed as to two of the defendants, the district court reasoned that the unfair competition claims involved the same facts and thus retained jurisdiction over these two defendants under its power to exercise pendent jurisdiction over the claims against them. In affirming the district court's rationale, the court of appeals briefly discussed and either rejected or distinguished *Hymer* and the other decisions raised in support of the "lack of power" position. The court stated:

> We agree with the rationale of the district court that as a matter of law under Sec. 1338(b), *or as a matter of discretion in the exercise of pendent jurisdiction*, the appealing defendants must remain in this federal lawsuit for, as Judge Larson indicated "... It would be an unjustifiable waste of judicial and professional time—indeed, a travesty on sound judicial administration—to allow plaintiff to try his unfair competition claim against Reynolds and Huck Finn, Inc., in Federal court but to require him to prosecute a claim involving precisely the same facts against Berquist and Solar Plastics, Inc., in a State court...."

Defendants have cited cases to the contrary on the pendent jurisdiction theory, *Hymer v. Chai*, 407 F.2d 136 (9th Cir. (1969); *Moor v. Madigan*, 458 F.2d 1217 (9th Cir. 1972); *Patrum v. City of Greensburg, Kentucky*, 419 F.2d 1300 (6th Cir.

1969), cert. denied 397 U.S. 990, 90 S.Ct. 1125, 25 L.Ed.2d 398 (1970); *Wojtas v. Village of Niles,* 334 F.2d 797 (7th Cir. 1964); cert. denied 379 U.S. 964, 85 S.Ct. 655, 13 L.Ed.2d 558 (1965).

We find these precedents inapposite. The general doctrine enunciated in *Hymer, supra,* 407 F.2d at 137, that the doctrine of pendent jurisdiction applies only to joinder of claims, and not to joinder of parties, has been criticized and rejected by this court in *Hatridge v. Aetna Casualty & Surety Co.*, 415 F.2d 809, 817 (8th Cir. 1969). Without exercising judgment as to the merits of the jurisdictional determinations in the remaining cases, we find them distinguishable on their facts. (emphasis supplied.)

472 F.2d at 866-67.

B. U.S. District Court Decisions Have Also Recognized The Power To Join Pendent Parties. . . .

Several U.S. district court cases have occurred since *Gibbs* in which the court has relied on that decision's language about the power inherent in federal courts, to exercise pendent jurisdiction over nonfederal parties as well as claims.

Newman v. Freeman, 262 F. Supp. 106 (E.D. Pa. 1966), involved a minor's claim for injuries sustained in an automobile accident and also his father's claim for medical expenses and loss of services due to the son's injuries. The son's claim was properly within the court's diversity jurisdiction and the issue was whether the father's claim could be joined under Fed. R. Civ. P. 15(a). Since this would destroy diversity jurisdiction in the case, the claim could be joined only under pendent

jurisdiction. Applying the *Gibbs* rationale the court said:

> Under the doctrine of pendent jurisdiction, this court has power over any claim for relief not otherwise subject to its jurisdiction so long as it derives from a common nucleus of operative fact with a federal claim that is properly within our power as outlined in Article III of the Constitution.
>
> 262 F. Supp. at 107.
>
> The whole basis of pendent jurisdiction is the fact that one claim is within our jurisdiction and the other would not be if it stood alone. The reason why it is not within our power seems to be immaterial, and no cases have been pointed out to us by counsel where such distinction has been drawn . . . The $10,000 requirement and the diversity requirement are both limitations on our power to hear cases, and we can see no distinctions between them for the purposes of the motion now before us. So long as one claim is substantial and is properly before us and the other derives from the same operative facts in the manner it does here and logically would be tried in the same proceeding, we have power to adjudicate the entire controversy.
>
> 262 F. Supp. at 108-09.

Applying this reasoning to the factual situation before it, the court allowed joinder of the father's claim. Though the situation in *Newman* concerned joining an additional plaintiff under pendent jurisdiction, the court's language is easily adaptable to application of the doctrine of pendent jurisdiction to join defendants as well.

A decision from an Iowa district court, which presented a thorough discussion of the exercise of

pendent jurisdiction to join parties both in terms of *Gibbs* and in terms of other federal cases considering application of the doctrine, was *Eidschun v. Pierce,* 335 F. Supp. 603 (D.D. Iowa 1971). That case involved a civil rights action under 42 U.S.C. §1983 and state tort claims for assault against the City of Council Bluffs and five of its police officers for the death of the plaintiff's testator. In determining how to rule on the city's motion to dismiss for lack of jurisdiction, the court reviewed *Gibbs, Jacobson, supra, Patrum, supra,* and some other decisions involving similar factual situations. After noting the language of the *Patrum* decision regarding the power of federal courts to exercise pendent jurisdiction to join parties, the court in *Eidschun* said:

> On the basis of the *Patrum* decision, this Court concludes that it does have the power under the *Gibbs* articulation of the doctrine of pendent jurisdiction to entertain the state claims against the City of Council Bluffs in the instant case.
>
> 335 F. Supp. at 609.

Noting the paucity of decisions expressly supporting this interpretation of pendent jurisdiction, the court observed that a trend favoring such an application of the theory had developed.

> Although a few cases in recent years have held against the exercise of pendent jurisdiction, the clear trend in the last decade, and especially since *Gibbs,* is towards hearing state claims in federal courts in the situation where the claims of some plaintiffs meet federal jurisdictional requirements and the claims of other plaintiffs, although not meeting federal jurisdictional requirements independently, arise out of the same nucleus of operative fact.
>
> 335 F. Supp. at 610.

After reviewing the other decisions in the area, the court resolved the question in favor of exercising jurisdiction over the city.

> ". . . . while there are many reported decisions which have allowed the entry of additional plaintiffs, there are very few which have allowed the addition of new defendants under the doctrine of pendent jurisdiction. This Court can see no meaningful distinction between the two situations . . .
>
> The four cases discussed above, involving the question of bringing in additional defendants under the doctrine of pendent jurisdiction all agree that a federal court has the power by reason of the *Gibbs* decision to hear such pendent claims. The cases split over whether the district court should exercise its discretion to hear the pendent claim, each case following the *Gibbs* standards, and each case being decided on its own unique facts. The court can find no case decided after *Gibbs* and meeting the *Gibbs* power criteria which says a federal court does not have the power and discretion to hear a pendent claim against an additional defendant. . . .
>
> This Court does have the power to hear the state claims against the City of Council Bluffs.
>
> 335 F. Supp. at 612.

Another case dealing with the joinder of additional defendants under the theory of pendent jurisdiction was *Shippers & Receivers Coop. Ass'n, Inc.,* 355 F. Supp. 949 (E.D. Pa. 1973). In that case, a shipper-consignee asserted a claim against a railroad under the Interstate Commerce Act, 49 U.S.C. §20, and a negligence claim against a codefendant as to whom there was no diversity of citizenship for damage to goods shipped. Reviewing *Hurn* and *Gibbs* and the standards set out in

the latter decision for the exercise of pendent jurisdiction, the court cited with approval the observation in Moore's FEDERAL PRACTICE that

> . . . cases antedating *Gibbs*, denying judicial power over the pendent claim, are "suspect as authority". 3A Moore, FEDERAL PRACTICE, Sec. 18.07, (1-4) at p.1953.
>
> 355 F. Supp. at 951-52.

After discussing decisions from the court of appeals for the third circuit, especially *Jacobson v. Atlantic City Hospital, supra,* and its statement that the considerations underlying the exercise of pendent jurisdiction in federal question cases are equally applicable to diversity cases, the court ruled that it had power to take jurisdiction over pendent parties.

> Thus, on the legal issue before us, we conclude that under *Gibbs,* federal jurisdiction may be asserted over additional parties who were not involved in the federal claim and whose sole connection with the case stemmed from the pendent state law claim.
>
> 355 F. Supp. at 954.

Other district court decisions which recognized the power to join additional parties under the theory of pendent jurisdiction but which did so without extensive discussion of the underlying rationale are: *Fahrner v. Gentzsch,* 355 F. Supp. 349 (E.D. Pa. 1972), allowing the exercise of federal jurisdiction over a nondiverse plaintiff; *Thomas v. Old Forge Coal Co.,* 329 F. Supp. 1000, 1002 (M.D. Pa. 1971), recognizing the court's power to join a pendent defendant; *Maloney v. United States,* 354 F. Supp. 480, 481 (S.D. N.Y. 1972), allowing joinder of a tort claim against a nondiverse

defendant; and, *Latch v. Tennessee Valley Authority,* 312 F. Supp. 1069 (N.D. Miss. 1970), which, while recognizing the court's power to hear the state claim against a defendant, decided, as a matter of discretion, not to exercise the power because of other factors in the case.

IV.

THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS STEADFASTLY DECLINED TO ALTER ITS PRE-*GIBBS* REFUSAL TO ALLOW THE JOINDER OF PENDENT PARTIES. THE NINTH CIRCUIT VIEW IS "SUSPECT AS AUTHORITY". . . .

> "*Hymer* stands virtually alone against (the) post-*Gibbs* trend in the courts of appeals, and significantly *Hymer* was largely based on the Court of Appeals' earlier decision . . . which predated *Gibbs* and the expansion of the concept of pendent jurisdiction . . ." (footnote omitted.)
>
> *Moor v. County of Alameda,* 411 U.S. at 713-714 referring to *Hymer v. Chai,* 407 F.2d 136 (1969).

As stated in Moore's FEDERAL PRACTICE, "Cases antedating *Gibbs* that denied judicial power, i.e., jurisdiction over the pendent claim, are suspect as authority." 3A.J. Moore, FEDERAL PRACTICE ¶18.07, [1-4], at p.1953 (2d ed. 1974).

If *Gibbs,* and the wide panorama of cases it produced, leave any doubt as to the reasonableness and common sense approach of allowing joinder of pendent parties in appropriate circumstances, it is not apparent to the U.S. district court for the central division of

California. That court, after waxing eloquent on the propriety of applying pendent jurisdiction to a nonfederal party in the case before it, concludes with the reluctant realization that, residing within the ninth circuit, it was bound by *Hymer v. Chai*, 407 F.2d 136 (1969)[10] , whereupon it provided the plaintiff with a 28 U.S.C. §1292 certification.

In the case of *Kaufman v. Union Pacific Railroad Co.*, 351 F. Supp. 392 (C.D. Ca. 1972), a railroad employee sought to join a second defendant in his action under the Federal Employers' Liability Act, 45 U.S.C. §51, et seq. for injuries sustained when he fell from a box car. The plaintiff, an employee of the Union Pacific Railroad, tried to stop a moving car which belonged to the Southern Pacific Railroad. The brake on the car failed to work properly and the plaintiff was injured. The plaintiff sued both railroads under FELA and also charged violation of the Railroad Safety Appliance Act, 45 U.S.C. §11 because the car was not equipped with an effective hand brake. Southern Pacific moved for dismissal alleging that there was no cause of action stated against it under FELA since it was not plaintiff's employer and that the other Act did not create a federal claim. Agreeing with these contentions, the court stated that any recovery against Southern Pacific would thus have to be based on state law. Since diversity would be destroyed if Southern Pacific was joined, the court concluded that Southern Pacific's motion for dismissal must be granted unless it could be joined under the theory of pendent jurisdiction.

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[10]*Hymer*, a post-*Gibbs* case, continues to rely upon *Takashi Kataoka v. May Department Stores Co.*, 115 F.2d 521 (9th Cir. 1940), a pre-*Gibbs* case.

In its discussion of the doctrine of pendent jurisdiction, the court expressed the frustration of being bound by the inflexible ninth circuit position.

> This court is of the view that, assuming that the plaintiff can sustain his allegations, the entire case involves "... but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex."....
>
> Also, it seems evident that considerations of reasonable convenience, financial economy, conservation of judicial time, and fairness to the parties strongly indicate that all of the claims growing out of the plaintiff's fall from the freight car should be litigated in one action.
>
> Under these circumstances, it would appear that this case fulfills the test of pendent jurisdiction announced in the opinion in *Gibbs*.... (Citation and quotation from *Gibbs* omitted.)

This court finds nothing in such a test that would necessarily exclude use of pendent jurisdiction to accomplish joinder of parties, particularly inasmuch as the *Gibbs* opinion said, with respect to the Federal Rules of Civil Procedure; "Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, *parties* and remedies, is strongly encouraged." (383 U.S. at 724, 86 S.Ct. at 1138). (Emphasis supplied)

I believe, also, that there is much merit in *Hipp v. United States*, 313 F. Supp. 1152 (E.D. N.Y. 1970), which invoked pendent jurisdiction under comparable circumstances.

However, I am obliged to conclude that the controlling decision in this Circuit is *Hymer v. Chai*, 407 F.2d 136 (9th Cir. 1969), which ruled

that the doctrine of pendent jurisdiction applies to "joinder of claims, not joinder of parties." (Page 137).

351 F. Supp. 393.

Though it felt bound by the ninth circuit decision, the district court respectfully suggested that the court of appeals reevaluate its position.

> In view of the possibility that the Court of Appeals might agree with this court that the *Hymer* doctrine is unduly restrictive when applied to the situation here concerned, the present order is certified as being appropriate for interlocutory appeal, pursuant to 28 U.S.C. Sec. 1292(b), in the event that the plaintiff desires to prosecute such an appeal.

351 F. Supp. at 394.

The case of *Hipp v. United States,* 313 F. Supp. 1152 (E.D. N.Y. 1970), cited in *Kaufman* above, concerned an action against the United States and a private defendant for injuries sustained when a Navy ambulance collided with the car driven by the private defendant. The issue was whether the federal court could exercise jurisdiction over the private defendant. The court answered this query by discussing the development of the doctrine of pendent jurisdiction since *Hurn*. The court noted that the law set out by *Hurn* was changed by *Gibbs* and continued to discuss the doctrine's development under *Gibbs* and its progeny.

> This case differs from *Gibbs* and *Rosado* in that they involved two causes of action against one person rather than one cause of action against two persons. Nevertheless, the court in *Gibbs* treated joinder of parties as similar to joinder of causes of

> action. It cited the adoption of the Federal Rules of Civil Procedure as one of the reasons for departing from the Hurn test and stated (383 U.S. at 724, 86 S.Ct. at 1138):
>
> > Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties, and remedies is strongly encouraged.
>
> The case of a joint tort-feasor made a defendant in a case under the Federal Tort Claims Act is peculiarly appropriate for application of the principle of "the conservation of judicial energy and the avoidance of multiplicity of litigation" because the "plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding."
>
> 313 F. Supp. at 1154-55.

Having so found pendent jurisdiction appropriate in the case before it, the court took jurisdiction over the private defendant.

At this time, district courts in the second, third, fourth, fifth, sixth, and eighth circuits are free to make determinations of this nature in appropriate cases, as their advised discretion dictates. The U.S. district court for the eastern district of Washington cannot.

V.

THERE IS SUBSTANTIAL JUSTIFICATION AND VERY GOOD REASON FOR THE DISTRICT COURT TO HAVE THE POWER TO DETERMINE, AS A MATTER OF DISCRETION, WHETHER IT IS USEFUL, HELPFUL, NECESSARY, OR OTHERWISE APPROPRIATE TO HEAR CLAIMS AGAINST NONFEDERAL PARTIES.

The most convincing expression of justification for the district court's power to join pendent parties can be found in the *Gibbs* opinion itself. Although *Gibbs* did not specifically refer to the question of joinder of parties, courts have held that ". . . Mr. Justice Brennan's language and the common sense considerations underlying it seem broad enough to cover that problem also." *Astor-Honor, supra* at 629-630.

There are many policy reasons for the district court to have the power to hear and decide claims involving pendent parties. The constant thread woven through every analysis of the question is the preservation of judicial economy, convenience, and fairness to litigants. The application of these strong policy considerations frequently takes many forms: the doctrine of res judicata, the doctrine of collateral estoppel, prevention of forum shopping, avoiding duplication of damage awards (fashioning relief), fulfilling the philosophy of the Federal Rules, avoiding piecemeal litigation, and effectuation of federal policy are all questions that must be answered when the court, in its pretrial order, determines the issues to be tried. There are, very obviously, a myriad of occasions when one or more of

these intensely practical considerations will indicate or require the joinder of a pendent party.

The grant of judicial power of Article III §2 is over "cases". The *Gibbs* Court recognized that a state claim can be sufficiently related to a federal claim so that "the entire action before the Court comprises but one constitutional 'case' ". 383 U.S. at 725, 86 S.Ct. at 1138. Indeed, throughout the history of our judicial system, "cases" have often involved three or more parties, and under the Federal Rules, "joinder of claims, parties and remedies is strongly encouraged".[11] *Gibbs,* 383 U.S. at 724, 86 S.Ct. at 1138.

Often, when the question of "pendent party" arises, the facts are such that there would be little question as to the propriety of joinder were the configuration of parties different. An example of this occurred in *Borror v. Sharon Steel Co.*, 327 F.2d 165 (3rd Cir. 1964). In that pre-*Gibbs* case, an out of state administrator brought, in federal court, an action for survival as well as an action for wrongful death. The court held that both actions were properly tried by the administrator, but that even if they were not, the court could exercise jurisdiction over the wrongful death claim of the nonfederal plaintiff, pendent to the courts diversity jurisdiction over the survival claim. See also, *Newman v. Freeman,* 262 F. Supp. 106 (E.D. Pa. 1966).

Gibbs outlined three "tests" to determine the propriety of joining a pendent state claim. First, the threshold question is whether the jurisdiction granting federal claim is substantial. The second test is stated as follows:

---

[11]See e.g., Fed. R. Civ. P. 2, 18-20, 42.

"The state and federal claims must derive from a common nucleus of operative fact."

383 U.S. 725, 86 S.Ct. 1138.

It is clear that this test can be met in a pendent party situation. The court of appeals for the second circuit, in joining a pendent defendant, stated:

"Thus, we conclude that in a case such as this, *where the facts underlying the state and federal claims are identical,* a federal court vested with admiralty jurisdiction over a shipper's claim against the carrier for breach of contract of carriage does have the "power" also to entertain its state tort claim against a pier operator." (Emphasis supplied.)

Leather's Best Inc. v. S.S. Mormaclynx, 451 F.2d 800, 811 (2nd Cir. 1971).

The instant case has similarly identical facts giving rise to both federal and state claims.

The third test is:

"But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding . . ."

383 U.S. 725, 86 S.Ct. at 1138.

Clearly, the Federal Rules contemplate that a plaintiff could "ordinarily be expected" to join additional plaintiffs or defendants in the same "case". Fed. R. Civ. P. 18-20. While the rules cannot expand federal jurisdiction (See Fed. R. Civ. P. 82), certainly they can be regarded as visible testimony to the expectation that cases may include more than one plaintiff or defendant.

One commentator has suggested that the phrase "ordinarily be expected to try them all in one judicial proceeding" refers to the requirements of the doctrine

of res judicata, were all of the involved claims federally created or state created.[12] See Wright, Miller and Cooper, FEDERAL PRACTICE AND PROCEDURE §3567 P.445 (1975).

However, in *Gibbs,* this Court recognized that it was not the doctrine of res judicata that compelled federal courts to exercise pendent jurisdiction, but rather the underlying rationale of that doctrine.

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[12]The doctrine of res judicata only bars litigation of matters contained in the "same cause of action" as those which were or could have been finally adjudicated in a prior case. *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 579-80, 94 S.Ct. 806, 811-12 (1974). This doctrine has the effect of making judgments conclusive upon any later action, not only to those matters which actually were litigated, but also to matters which could have been litigated in the prior action. A claimant cannot "split" his cause of action. *Harrison v. Bloomfield Bldgs. Indus.*, 435 F.2d 1192 (6th Cir. 1970). If an issue is beyond the jurisdiction of a court, by definition it is not one which "could have been litigated", and hence a party cannot be barred by failing to raise it. If a claim is pendent or ancillary to an existing claim, then it "could have been litigated". However, if it is neither pendent or ancillary to an existing claim, the operation of res judicata will not require the assertion of either one of the doctrines to preserve the claim. Therefore, the possible application of res judicata is not a proper test to determine when pendent or ancillary jurisdiction should be exercised.

The requirement of the doctrine of res judicata, and of pendent jurisdiction under *Hurn,* that two claims "state the same cause of action", was rejected in *Gibbs* as being "unnecessarily grudging" as a test for whether a claim could be pendent. The "same cause of action" test is still used, however, as an element of res judicata. *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 579-80, 94 S.Ct. 806, 811-12 (1974). *See also, Shakman,* 20 Stan. L. Rev. 262, 279-280. *The New Pendent Jurisdiction of the Federal Courts.*

> "Had the court found a jurisdictional bar to reaching the state claim in *Hurn*, we assume that the doctrine of *res judicata* would not have been applicable in any subsequent state suit. But the citation of *Baltimore S.S. Co.* shows that court found that the weighty policies of judicial economy and fairness to parties reflected in *res judicata* doctrine were in themselves strong counsel for the adoption of a rule which would permit federal courts to dispose of the state as well as federal claims."
>
> 383 U.S. 724, 86 S.Ct. 1137-8.

The Court was clearly not as interested in the elements of res judicata as it was in the underlying policies and their relation to pendent jurisdiction.

On the other hand, collateral estoppel provides compelling justification for the addition of pendent parties. Estoppel occurs if the issue is identical to an issue in a prior case, if the first judgment was final, and if the person against whom it is asserted was a party to the prior action.[13] *Blonder-Tongue Lab. Inc. v. Univ.*

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[13]The older view of collateral estoppel requiring "mutuality" of estoppel has been rejected. In *Blonder-Tongue Lab. Inc. v. Univ. of Ill. Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971), the Court recognized that plaintiff who "has had one full and fair opportunity to prove a claim and has failed in that effort should not be permitted to the trial on the merits of that claim a second time". 402 U.S. 323, 91 S.Ct. 1440. The Court recognized the public interest in efficient judicial administration and the interest in a proper allocation of resources, and served those interests in rejecting "mutuality". *Id.* at U.S. 329-30, S.Ct. 1142-3. Where a federal plaintiff seeks to observe these principles by joining a pendent defendant, his efforts should not be thwarted by an inflexible rule.

of Ill. Foundation, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971). Under this doctrine, a plaintiff who loses an issue in a suit can be estopped from raising the same issue against a different party in a later suit. However, if the plaintiff should win in the first suit, he must re-litigate the issue against the different defendant in the second suit. The second defendant gets two chances to win but the plaintiff must win twice to get full recovery, a "gaming table" advantage.[14] This inordinate result of identity of claims but not of parties, is clearly contrary to the *Gibbs* rationale.[15]

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[14]The phrase "gaming table" is taken from the *Blonder-Tongue* opinion, in which "mutuality" of estoppel was rejected.

[15]Obviously, collateral estoppel may be successfully asserted by a defendant in a suit in state court on the basis of a federal judgment where the defendant was not a party to the federal proceeding. *Vavolizza v. Krieger*, 352 N.Y.S.2d 919 (1974). Such a result is especially distasteful where "... the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong ..." *Gibbs, supra*, at U.S. 727, S.Ct. 1139.

The validity of this proposition was underscored in the American Law Institute Study, *"The Division of Jurisdiction between State and Federal Courts"* 164-165 (1969). Some of the reasons advanced by the Study for preferring federal courts for federal question cases are: (i) "a considerable expertise in the interpretation and application of federal law which would be lost if federal question cases were given to the state court." (ii)a belief "that greater uniformity [of decisions] results from hearing those cases in a federal court"; and (iii)a belief "that federal courts are more likely to apply federal law sympathetically and understandingly than are state courts." In addition to these considerations, the study observed:

> Finally, determinations of fact by the state court are subject to, at most, limited review in the Supreme Court. The federal rights of a party will frequently depend upon

Surely, a crafty defendant would enjoy such a result. As he watches the first trial insulated from liability, he learns the plaintiff's trial strategy without risk. If the plaintiff prevails against the first defendant, the second defendant has the immeasurable advantage of having observed a trial of precisely the same issues that he will face, and can prepare accordingly. Accordingly, the very real possibility of the assertion of the doctrine of collateral estoppel provides very strong impetus to a court to allow all parties to be joined in the original action.

Further, many actions involve claims which are complementary in nature. In these actions, pendent jurisdiction is particularly appropriate to avoid the possibility of double recovery. In speaking of wrongful death and survival actions, the court of appeals for the third circuit stated as follows:

> "The two suits are complementary under the laws of Pennsylvania. The plaintiff and the defendant are the same in both causes. The tort relied on is the same in both, the operative facts which give rise to the two suits are identical in each. The wrongful death action may be considered ancillary or pendent to the survival action, or the latter pendent to the former. Such a concept seems clearly within the contemplation of Pennsyl-

---

what the facts are found to be—see *Prentis v. Atlantic O. L. Co.*, 211 U.S. 210, 228 (1908)—and an appeal, after the case has been shaped by the fact findings of an unsympathetic state court, is, as Chief Justice Marshall long ago observed, an 'insecure remedy'. *Osborne v. Bank of the United States*, 9 Wheat. 738, 822 (1824)

Id. at 167-168.

> vania practice. Such a course saves the time of jurors, of witnesses, of the parties and of the judges, and prevents tortfeasors from being mulcted of damages."
>
> *Borror v. Sharon Steel Co.*, 327 F.2d 165 (3rd Cir. 1964).

Members of this Court are well aware of the dangers of overcompensating a plaintiff in actions of this nature. A strong dissent was entered in a decision allowing a wife to sue in admiralty for wrongful death and financial loss upon the death of her husband after his estate had once recovered for lost earnings. Mr. Justice Powell, in dissent, had this to say:

> "There should be strong reasons of policy to justify such repetitive suits and to impose on the petitioner the attendant doubling of litigation expenses. The reasons advanced by the majority opinion do not, in my view, approach that level of persuasion. Petitioner has already fully litigated, and paid, a large judgment compensating Gaudet's estate for the injuries Gaudet incurred on board its vessel . . . Today's result deprives petitioner of that reliance interest [in considering the case closed], subjecting it to another round of litigation with wide-open damage possibilities".
>
> *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. at 612-13, 94 S.Ct. at 828.

The problem of a plaintiff being over-compensated may also arise where he has claims for the same injury against two defendants. In joining a hospital as a pendent defendant in a wrongful death action, the court of appeals for the third circuit said:

> "It should be added that in the present case no apparent disadvantage would be imposed upon the hospital, located in Atlantic City, by having the

> claim against it tried in a New Jersey federal court together with the claims against the doctors. Indeed, such a procedure may well aid in the equitable determination and allocation of responsibility, if any, for the fatal mishap."
>
> *Jacobson v. Atlantic City Hospital,* 392 F.2d 149, 154 (3rd Cir. 1968).

Under the facts of that case, the proper allocation of damages could have been a momentous factor. The hospital's liability was limited to $10,000.00 under New Jersey law, but the doctor's liability was not. 392 F.2d at 152-3. Had the claims been tried separately, the plaintiffs may have been over-compensated or under-compensated if responsibility for the fatality were misallocated.

Some federal laws have a complementary relationship with state laws in that the state laws or remedies implicate and effectuate federal policies. For example, an action for damages for assault under state law was held pendent to a federal civil rights claim under 42 U.S.C. §1983 where the assault was in furtherance of a conspiracy to deny plaintiff his right to use a public accommodation. *Sherrod v. Pink Hat Cafe,* 250 F. Supp. 516 (N.D. Miss., 1965).

Issues of state law enacted pursuant to the theme of cooperative federalism are similarly of a complementary nature. Such state laws are certainly made to effectuate a federal purpose and are particularly appropriate subjects for the exercise of pendent jurisdiction. See e.g., *Hagans v. Levine,* 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). In addition, many federal laws complement one another, and claims arising thereunder are obviously appropriate to be tried together when the facts so suggest.

The possibility of over-compensation, discussed above, is resolved when a court joins all proper claims and parties in order to reach a comprehensive judgment. Federal courts must also be concerned with reaching a judgment that will not be rendered "hollow" or "vacant" by a subsequent decision of a state court. A hollow judgment may occur when parties that should be before the court are not joined. See e.g., *Phelps v. Oaks,* 117 U.S. 236, 6 S.Ct. 714, 29 L.Ed. 888 (1886).

The list could go on. What is apparent is that there is no hard rule that could possibly contemplate all potential configurations of claims and parties, and there is no test that can adequately provide economy, convenience and fairness in all situations. It was for this reason that the discretionary doctrine of pendent jurisdiction evolved, to give the trier of fact discretion with which to fashion the case and provide appropriate and complete relief.

This discretion is the *sine qua non* of the judicial system as we know it. Wright, in a general discussion of the federal rules of civil procedure states it this way:

> It is not an exaggeration to say that the keystone to the effective functioning of the federal rules is the discretion of the trial court.
>
> 4 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE §1029, P.129 (1969).

Exercising such discretion is particularly within the trial court's competence to accomplish. In fact, the federal rules provide the district court with considerable discretion, with the admonition that the procedural framework in which litigation is conducted promote the

ends of justice and facilitate decisions on the merits, rather than determinations on technicalities.[16]

Wright goes on to say:

> The rules will remain a workable system only as long as trial court judges exercise their discretion intelligently on a case by case basis; application of arbitrary rules of law to particular situations only will have a debilitating effect on the overall system.
>
> 4 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE §1029, P.129 (1969).

CONCLUSION

It is apparent that there is no constitutional nor statutory bar to the exercise of pendent jurisdiction over claims against nonfederal parties. In fact, there are specific and compelling reasons why this Court should allow the district court for the eastern district of Washington to exercise its discretion in this regard.

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[16]See Wright, *Id.* at 129, fn. 89

"For example, see Rules 4(h), 8(f) ("All pleadings shall be so construed as to do substantial justice"), 12(e), 13(f), 15(a) ("leave [to amend] shall be freely given when justice so required"), 15(b), 16, 21, 24, 25(d)(1), 26, 27, 28, 30(b) ("or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression"), 32, 33, 35, 37, 42 ("[the court] may make such [consolidation] orders concerning proceedings therein as may tend to avoid unnecessary costs or delay"; "[the court may order separate trials when they] will be conducive to expedition and economy"), 54, 56, 57, 65, and 84."

First, in *Moor v. County of Alameda, supra,* a California case, this Court upheld the trial courts' apparent discretionary decision to dismiss the county, and noted that in California there was a difficult state law question concerning the liability of a county. In Washington there is no such difficult question of state law. Wash. Rev. Code 4.96.010 (1967) provides that counties shall be liable for damages arising out of their tortious conduct or the tortious conduct of their officers, agents, or employees to the same extent as if they were a private person or corporation. Further, Wash. Rev. Code 4.08.120 (1973), providing for vicarious liability of counties, has legislatively abolished sovereign immunity.

Hence, there is no obstacle whatsoever to filing and prosecuting claims, based upon the tortious conduct of county employees, against the county itself. Accordingly, the only state law question added by the presence of Spokane County as a defendant is: Was the defendant treasurer acting within the scope of his employment?, a simple question of fact.

Another consideration expressed in *Moor* was the possibility of jury confusion. In the present case only one question need be answered by the jury with regard to the liability of defendant Spokane County: "If you find the individual defendant liable on any claim, was he acting within the scope of his employment (as defined in instructions) at the time the acts or omissions occurred?" There is not even a remote possibility of jury confusion. All that will be required is an instruction on the master/servant relationship and the liability flowing from it.

Finally, the *Moor* Court listed judicial economy, convenience, and fairness as considerations to be used

in weighing the trial courts' exercise of discretion. Judicial economy would best be served by leaving Spokane County in this case. There cannot be a clearer example of what the *Gibbs* opinion contemplated: The claim against the county arises out of the same "common nucleus of operative fact," and is an equal aspect of the same constitutional "case" as the claim against the county officer. In fact, the same set of facts gives rise to the claims against both defendants.

If the plaintiffs are forced to sue Spokane County in Spokane County superior court in a separate action, all of the parties, as well as both trial courts involved, will be forced to try the exact same case twice, in two different forums. The only thing different will be the named defendant in the caption of the pleadings. In addition to burdening the court system, this will result in considerable inconvenience for parties and for witnesses. They will be forced to appear once in federal court and once in county court to testify concerning the same facts. The only additional testimony in county court would be whether the defendant treasurer acted within the scope of his employment by the defendant county.

That such a procedure is less than satisfactory has been noted by courts and commentators. See e.g., Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. Cal. L. Rev. 131, (1972) which stated in pertinent part:

> "The disadvantages of such a procedure are clear. Pendent jurisdiction seems to be appropriate in such cases because both claims would normally be tried in one proceeding and would require similar factual showing. For example, to sustain a Section 1983 claim of excessive force and/or false arrest against law enforcement officers, a litigant must prove their: (1) assault and/or (2) false arrest, of him, and their (3) employment (or other investiture with power) by a state or local governmental agency. To prove his state law claims against the police officers and their public employer, the litigant must prove their: (1) assault and/or (2) false arrest, of him, and their (3) employment by a governmental entity. A litigant seemingly could conclusively demonstrate the substantial identity of his federal and his state law claims by incorporating, in *haec verba*, the allegations of his federal causes of action when setting out his state cause of action. To require parties in cases such as this to relitigate the facts of their federal law claims in state court is to make federalism a fetish rather than virtue."

Id. at 163.

Under state law, the plaintiff has a valid claim against defendant Spokane County. If Spokane County cannot be included as a party in the U.S. district court, the result would be most unfair. First, she would be subject to the practical inconvenience of trying two law-suits. Second, she would be forced to take into consideration the outcome of the first lawsuit tried, or decided on motions, when negotiating and preparing for trial in the second. Third, although Congress has, by a 100 year old statute, provided her with access to federal courts when suing on her civil rights, she would be forced to bring her entire civil rights action in Spokane County superior court, in the very same building in which the acts that gave rise to the violation occurred, and ask one agency of Spokane County, the court, to assess damages against both the County and the employee of another County agency. Fourth, if she elected to sue in the U.S. district

court first, the doctrine of collateral estoppel would operate to prejudice her in a subsequent suit against the County in superior court since various factual issues would already have been tried.

For the foregoing reasons, the petitioner respectfully urges this Court to reverse the court below and allow the U.S. district court for the eastern district of Washington the power to determine, in its discretion, if it is helpful, useful, necessary or otherwise appropriate to join the claims against the defendant Spokane County with the existing claim against the Spokane County Treasurer.

Respectfully submitted,

/s/Norman Rosenberg
NORMAN ROSENBERG
Counsel for Petitioner

Supreme Court, U. S.
FILED
JAN 5 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 74-6521

MONICA ALDINGER,

Petitioner,

v.

MERTON HOWARD, individually and in his capacity as Treasurer of Spokane County,

Defendant,

and SPOKANE COUNTY, a public corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE RESPONDENT

DONALD C. BROCKETT
Spokane County Prosecuting Attorney

GARALD A. GESINGER
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County-City Public Safety Building
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STATEMENT OF THE CASE

The petitioner was terminated from her position in the Spokane County Treasurer's Office in 1971, as she alleges. However, it was not until the Second Amended Complaint was filed some two years later that any assertion or question of pendent jurisdiction was made by petitioner (App. 3, 13).

The sole reference to pendent jurisdiction made by petitioner in her second amended complaint was the conclusory statement that: "Further, the Federal District Court may exercise Pendant [sic] Jurisdiction over the state law claims against the parties as more fully set forth herein."

No state claim whatsoever against the respondent County was stated upon which any relief could be granted. In the paragraph entitled PARTIES, petitioner merely stated that Defendant, Howard, was acting as an agent of Spokane County (App. 13) and "Defendant Spokane County is a public corporation and an action may be maintained against it authorized by RCW 4.08.120." (App. 14)

SUMMARY OF ARGUMENT

The Constitution of the United States empowers the federal judiciary under Article III, Section 2, with the ability to hear and determine certain cases. The ability to hear and determine these cases has been extended by the federal courts by virtue of the doctrine of pendent jurisdiction in which the courts have taken unto

themselves both state claims and additional parties because of their determination that under basic reasons of fairness they would be unable otherwise to determine the "whole case."

Respondent contends in this proceeding that such a creation and extension of pendent jurisdiction is, in fact, unconstitutional and should be abandoned by this court. The reasons for the abandonment of the doctrine are the same as those mentioned by the courts in a discussion of this doctrine and a determination that the doctrine should be merely discretionary.

The forefathers of this country did not envision that the federal judiciary would, by a doctrine known as pendent jurisdiction, usurp the power of the state judiciaries to determine their own state claims with a review later, if necessary, by the federal judiciary. Such an extension by the courts of this country has been largely to "do equity" to the parties without a realization that such is, in fact, in contravention of constitutional principles.

In this Civil Rights action, it is especially important for the Court to view the ramifications of the extension of the doctrine of pendent jurisdiction and determine at this time in the history of our country that we shall return to the power of the judiciary as envisioned by our forefathers and thus abandon pendent jurisdiction.

ARGUMENT

I

THE CONSTITUTION OF THE UNITED STATES CLEARLY INDICATES THAT

THERE IS A CONSTITUTIONAL BAR TO THE DOCTRINE OF PENDENT JURISDICTION ALLOWING THE FEDERAL COURTS TO DETERMINE STATE CLAIMS.

As clearly admitted by the petitioner, the jurisdiction of the federal courts was created and limited by the United States Constitution in Article III, Section 2. That provision of the Constitution provides, inter alia:

> "JURISDICTION. The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof and foreign states, citizens or subjects . . ."

It cannot be denied that the judicial power of the federal courts is limited, as are all other powers within the Constitution of the United States, by Amendment X which provides:

> "POWERS RESERVED TO STATES OR PEOPLE. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The doctrine of pendent jurisdiction has been artificially created by the courts as a result of their attempt to enlarge the clause "cases and controversies" contained within Article III, Section 2, of the United States Constitution. The question clearly presented in this case is whether or not the doctrine of pendent jurisdiction should be extended as it has been by various circuit courts within the federal system and adopted by this Court as a constitutional doctrine entitled to recognition henceforth.

The respondent contends herein that our forefathers did not intend that the jurisdiction of the federal courts would be other than as specifically set out in the United States Constitution. In a number of references to the United States Constitution, Alexander Hamilton, in presenting an argument to the people of the State of New York as to why the United States Constitution should be adopted, carefully explained the severe limitations upon federal authority by virtue of the explicit statements contained within that constitutional document.

The first such reference clearly appears in the Federalist Paper No. 32, wherein Hamilton states:

> "But as the plan of the Convention aims only at a partial Union

or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act exclusively delegated to the United States. This exclusive delegation or rather this alienation of State sovereignty would only exist in three cases; where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant. I use these terms to distinguish this last case from another which might appear to resemble it; but which would in fact be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy of any branch of administration, but would not imply any direct contradiction or repugnancy, in point of constitutional authority" (p. 200).

The Federalist, edited by J. E. Cooke, Wesleyan University Press (1961) Library of Congress Catalog Card Number: 61-6971.

Hamilton clearly recognized the difficulty that might occur as a result of concurrent

jurisdiction when he said in Federalist Paper No. 33:

> "The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power; and the rule that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour, is not only a theoretical consequence of that division but clearly admitted by the whole tenor of the instrument which contains the articles of the proposed constitution. We there find that notwithstanding affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States" (Id., p. 203).

With reference to the question of the supremacy of the law of the United States, Hamilton stated:

> "But it is said, that the laws of the Union are to be the Supreme Law of the land. But what inference can be drawn from this or what would they amount to, if they were not to be supreme? It is evident they would amount to nothing. A Law by the very meaning of the term includes supremacy. It is a rule which those to whom it is prescribed are

bound to observe. This results from every policital association. If individuals enter into a state of society the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government; which is only another word for POLITICAL POWER AND SUPREMACY. But it will not follow from this doctrine that acts of the larger society which are 'not pursuant' to its constitutional powers but which are invasions of the residuary authorities of the smaller societies will become the supreme law of the land. These will be merely acts of usurpation and will deserve to be treated as such. Hence we perceive that the clause which declares the supremacy of the laws of the Union, like the one we have just before considered, only declares a truth, which flows immediately and necessarily from the institution of a Federal Government. It will not, I presume, have escaped observation that it 'expressly' confines this supremacy to laws

made 'pursuant to the Constitution'; which I mention merely as an instance of caution in the Convention; since that limitation would have been to be understood though it had not been expressed." (The Federalist No. 33, Id., p. 207).

It will not be without difficulty that a determination be made as to the relative jurisdictions of the various courts as Hamilton recognized when he stated:

> "Experience has instructed us that no skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislative, Executive and Judiciary; or even the privileges and powers of the different Legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science. The experience of ages, with the continued and combined labors of the most enlightened Legislators and jurists, have been equally unsuccessful in delineating the several objects and limits of different codes of laws and different tribunals of justice. The precise extent of the common law, the statute law, the maritime law, the ecclesiastical law, the law of corporations and other local laws and customs, remain still to be clearly and finally established

> in Great-Britain, where accuracy in such subjects has been more industriously pursued than in any other part of the world. The jurisdiction of her several courts, general and local, of law, of equity, of admiralty, &c. is not less a source of frequent and intricate discussions, sufficiently denoting the indeterminate limits by which they are respectively circumscribed" (The Federalist No. 37, Id., pp. 235-236).

Hamilton clearly pointed out to the people of the State of New York the powers that were to be delegated by virtue of the Constitution to the federal government:

> "The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation, and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State" (The Federalist No. 45, Id., p. 313).

It is interesting to note that Hamilton believed that the judiciary would be the

weakest of the parts of government and certainly would not by virtue of a doctrine called "pendent jurisdiction" be able to overrule the ability of the Legislative Branch of government to govern.

> "Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments" (The Federalist No. 78, Id., pp. 522-523).

When Hamilton discussed the determinations to be made by the United States Supreme Court relative to cases which arose under the constitution or laws of the United States, he stated:

"The arguments or rather suggestions, upon which this charge is founded, are to this effect: 'The authority of the proposed supreme court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws, according to the spirit of the constitution will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous. In Britain, the judicial power in the last resort, resides in the house of lords, which is a branch of the legislature; and this part of the British government has been imitated in the state constitutions in general. The parliament of Great-Britain, and the legislatures of the several states, can at any time rectify by law, the exceptionable decisions of their respective courts. But the errors and usurpations of the supreme court of the United States will be uncontrolable and remediless.' This, upon examination, will be found to be altogether made up of false reasoning upon misconceived fact" (The Federalist No. 81, Id., pp. 542-543).

Hamilton apparently did not recognize that the judiciary even though powerless to act without the assistance of the execu-

tive could establish "causes of action" entirely upon their own which would cause their case law to be effectively considered by the citizens of the United States.

> "It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power; from the manner in which it is exercised; from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check, which the power of instituting impeachments, in one part of the legislative body, and of determining upon them in the other, would give to that body upon members of the judicial department. This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body

> entrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations" (The Federalist No. 81 Id., pp. 545-546).

The specific reservation and limitation upon the authority of the judiciary was set out in Federalist Paper No. 83:

> "In like manner, the judicial authority of the federal judicatures, is declared by the constitution to comprehend certain cases particularly specified. The expression of those cases marks the precise limits beyond which the federal courts cannot extend their jurisdiction; because the objects of their cognizance being enumerated, the specifications would be nugatory if it did not exclude all ideas of more entensive authority" (The Federalist No. 83, Id., p. 560).

It is respectfully submitted by the respondent in this case that the doctrine of pendent jurisdiction established by the court has in effect extended beyond the meaning and purpose of the Constitution and the spirit thereof the authority of the federal judiciary.

Hamilton proposed that the Bill of Rights which were being requested by certain states prior to the time that they would consider adoption of the United States Constitution was unnecessary and, in fact, dangerous when he stated:

> "I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason, that the constitution ought not to be charged with the absurdity of providing against the abuse of an authority, which was not given, and that provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it, was intended to be vested in the national government" (The Federalist No. 84, Id., p. 579).

Hence, respondent contends that the Constitution could not have been read to establish pendent jurisdiction over state claims in order to invest the federal judiciary with such power.

II

THERE IS NEITHER JUSTIFICATION NOR REASON FOR A FEDERAL DISTRICT COURT TO HAVE THE POWER ON THE BASIS OF PENDENT JURISDICTION TO DETERMINE STATE CLAIMS PRIOR TO THE TIME THAT THOSE DETERMINATIONS HAVE BEEN MADE IN A STATE COURT, AS A RESULT OF THE CONSTITUTIONAL PROHIBITIONS AND SENSIBLE DOCTRINE OF COMITY.

The respondent would contend that the petitioner has misread the case of United Mine Workers v. Gibbs, 383 U.S. 715, 16 L.Ed.2d 218, 86 S.Ct. 1130 (1966). In the Gibbs case, supra, the Court stated at 383 U.S. 721, 16 L.Ed.2d 225:

> "'. . . State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction.' San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247, 3 L.Ed.2d 775, 784, 79 S.Ct. 773."

It was also stated that:

> ". . . Pendent jurisdiction, in the sense of judicial power, exists when ever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ,' US Const, Art III, §2, and the relationship

> between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'[12] The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. . . ." 383 U.S. 725, 16 L.Ed.2d 227.

In determining that the power existent in the Federal courts under the doctrine of pendent jurisdiction was merely discretionary the Court further stated:

> "That power need not be exercized in every case in which it is found to exist. It has

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12. The question whether joined state and federal claims constitute one "case" for jurisdictional purposes is to be distinguished from the often equally difficult inquiry whether any "case" at all is presented, Gully v. First National Bank, 299 U.S. 109, 81 L.Ed. 70, 57 S.Ct. 96, although the issue whether a claim for relief qualifies as a case "arising under . . . the laws of the United States" and the issue whether federal and state claims constitute one "case" for pendent jurisdiction purposes may often appear together, see Dann v. Studebaker-Packard Corp, 288 F.2d 201, 211-215 (CA 6th Cir 1961); Borak v. J. I. Case Co., 317 F.2d 838, 847-848 (CA 7th Cir 1963), affd on other grounds, 377 U.S. 426, 12 L.Ed.2d 423, 84 S.Ct. 1555.

consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right.[14] Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, Erie R. Co. v. Tompkins, 304 US 64, 82 L.Ed. 1188, 58 S Ct 817, 114 ALR 1487. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.[15]" 385 US 726, 16 L.Ed.2d 228.

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14. Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497 (CA 1st Cir 1950); Moynahan v. Pari-Mutuel Employees Guild, 317 F.2d 209, 211-212 (CA 9th Cir 1963); op cit supra, notes 9 and 11.

15. Some have seen this consideration as the principal argument against exercise of pendent jurisdiction. Thus, before Erie, it was remarked that "the limitations [on pendent jurisdiction] are in the wise discretion of the courts to be fixed in individual cases by the exercise of that statesmanship which is required of any arbiter of the relations of states to

Respondent would seriously contend that this Court mistakenly applied the doctrine of pendent jurisdiction for the reasons as set out in the above-quotation. It should be considered that it is not a matter of judicial economy, convenience and fairness to litigants if the defendant, as in this case Spokane County, must be brought into a law suit in Federal District Court rather than having the ability to defend itself on proper state grounds in the state court.

The Court further in the Gibbs case, supra, stated at 383 U.S. 727, 16 L.Ed.2d 228:

> ". . . In the present case, for example, the allowable scope of the state claim implicates the federal doctrine of pre-emption; while this interrelationship does not create statutory federal question jurisdiction, Louisville & N.R. Co. v. Mottley, 211 US

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nation in a federal system." Shulman & Jaegerman, supra, note 9, at 408. In his oftcited concurrence in Strachman v. Palmer, 177 F.3d 427, 431 (CA 1st Cir 1949), Judge Magruder counseled that "[f]ederal courts should not be over-eager to hold on to the determination of issues that might be more appropriately left to settlement in state court litigation," at 433. See also Wechsler, supra, note 9, at 232-233; Note, 74 Harv L Rev 1660, 1661 (1961); Note, supra, note 11, at 1043-1044.

> 149, 53 L.Ed. 126, 29 S Ct 42, its existence is relevant to the exercise of discretion."

It seems odd that the Court would have mentioned that the allowable scope of the state claim implicates the federal doctrine of preemption for if the federal government has preempted the field by legislation it would not seem to be necessary for the doctrine of pendent jurisdiction to exist in order to bring into play any state claim.

Furthermore, the Court specifically emphasized at 383 U.S. 728, 16 L.Ed.2d 229:

> "We are not prepared to say that in the present case the District Court exceeded its discretion in proceeding to judgment on the state claim. . . ."

It is contended that the petitioner has misapplied the Gibbs case, supra, by indicating that it indirectly encouraged the extension of the doctrine of pendent jurisdiction in the Federal courts. Rather, respondent would contend that there was no such encouragement and that, in fact, this Court had not given the same thought to the ramifications as it did later in the case of Moor v. County of Alameda, 411 U.S. 695, 36 L.Ed.2d 596, 93 S.Ct. 1785 (1973).

In Moor, supra, the court stated at 411 U.S. 712, 36 L.Ed.2d 611:

> ". . . But, beyond this, there is a significant difference between Gibbs and these cases. For the exercise of pendent jurisdiction over the claims against the

> County would require us to bring an entirely new party--a new defendant--into each litigation."

The Court continued at 411 U.S. 715, 36 L.Ed.2d 611:

> ". . . At the same time, the County counsels that the Court should not be quick to sweep state law claims against an entirely new party within the jurisdiction of the lower federal courts which are courts of limited jurisdiction--a jurisdiction subject, within the limits of the Constitution, to the will of Congress, not the courts.[33] Whether there exists judicial power to hear the state law claims against the County, is, in short, a subtle and complex question with far-reaching implications."

The reasons then given by the Court for the appropriate refusal to exercise the discretion under pendent jurisdiction are the same as those that warrant the absence of the power to try the issues. Those reasons are stated at 411 U.S. 715, 36 L.Ed.2d 613:

> ". . . First, the District Court pointed out that it 'would be called upon to resolve difficult questions of California law upon

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33. Cf. Shakman, The New Pendent Jurisdiction of the Federal Courts, 20 Stan L. Rev 262, 265-266, 270-271 (1968).

which state court decisions are not legion.'[34] In addition, the court felt that 'with the introduction of a claim against the County under the California Tort Claims Act, with the special defenses available to the County, the case' which will be tried to a jury, 'could become unduly complicated.'[35] As is evident from this Court's decision in Gibbs, 383 US, at 726-727, 16 L.Ed.2d 218, the unsettled nature of state law and the likelihood of jury confusion were entirely appropriate factors for the District Court to consider. And those factors had to be weighed by the District Court against the economy which might be achieved by trying the petitioners' claims against both the police and the County in single proceedings."

As stated in the opinion of the Ninth Circuit Court in this case (App. 29) this Court's opinion in Moor, supra, advised that there are strong arguments in favor of restricting at least certain types of state law actions to available state forums rather than hearing them in federal courts.

Petitioner makes much of the fact that the Ninth Circuit Court of Appeals stands alone in its insistence that the extension

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34. Rundle v. Madigan, 331 F Supp 492, 495 n 5 (ND Cal 1971).

35. Ibid.

of the doctrine of pendent jurisdiction must be by this Court. It would appear that the Ninth Circuit Court of Appeals recognizes it's judicial limitations under the Constitution of the United States and therefore feels that any other appropriate determination must, in fact, be made by this Court. It is respondent's argument herein that the doctrine of pendent jurisdiction not be allowed to give the Federal District Court the power to hear cases which involve state claims. Rather, that the parties, especially the parties defendant, have the ability and the constitutional right to defend a cause of action when brought against them in the proper forum.

Again, the court's decision in the Ninth Circuit Court herein reasons that there are appropriate points against the extension of pendent jurisdiction in a case such as the one at bar. For example, the court opinion recognizes the serious inconvenience to the defendant which has been accomplished by the result of the application of the doctrine of pendent jurisdiction when it is applied to a defendant rather than the allowance of an additional plaintiff to pursue a state claim in federal court (App. 30).

Also, as the court opinion mentions, in most of the diversity cases where joinder of "pendent parties" has been permitted, the courts have been confronted with claims by members of a single family arising out of a single accident. That situation is considerably different from the situation at bar in which the petitioner would have the Court determine that by virtue of the filing of a federal cause of action the petitioner may establish or

gather a state claim into the jurisdiction of the federal courts even though such may be inappropriate.

The petitioner contends that the doctrine of pendent jurisdiction preserves the court's effectiveness and fairness to the parties. However, these reasons do not apply in this particular case. Such a court's "effectiveness" in a system of federalism does damage to Article III, Section 2 of the United States Constitution as limited by the Tenth Amendment thereof. It is also not fair to the defendant because he should have some say with reference to the jurisdiction or what value will a defense be to a defendant?

Petitioner has cited, in giving the history of pendent jurisdiction, the fact that Congress enacted the Judiciary Code which gave the federal courts exclusive jurisdiction over patent, copyright, and trademark actions. Petitioner cites 28 U.S.C. § 1338(b) and argues that its clause concerning "any civil action asserting a claim of unfair competition when joined with a substantial and related claim" is intended to extend the doctrine of pendent jurisdiction. However, it would seem that this action by Congress was a preemption of that particular field and hence it is unnecessary to discuss pendent jurisdiction with reference thereto. This is not so in a federal civil rights case; otherwise, the cases of this Court would not have limited it's application to "persons".

It is also interesting to note that if Congress would attempt to extend the Civil Rights Act by legislation into the states it could be questioned before this Court

as an unconstitutional act of Congress by virtue of the Tenth Amendment of the United States Constitution. Therefore, it seems inappropriate that what Congress may not do by legislative act, this Court may do by the inadvertent extension of pendent jurisdiction.

At a time when the federal courts are inundated with cases which should not be in the federal system, it would appear that the doctrine of pendent jurisdiction will not result in judicial economy, but rather in the proliferation of federal lawsuits by plaintiffs in order to avoid having to select the state forum for the trial of state claims. Saying it another way, it will no longer be necessary for the plaintiff to "carefully choose his forum." He will need only to find a federal remedy and then attempt to establish a state claim which can be tried within that federal remedy by virtue of pendent jurisdiction, if that doctrine is extended as the petitioner requests of this Court in this case.

The inappropriate application of pendent jurisdiction and the federal civil rules are not consistent with the United States Constitution and should be overruled so that the federal system will once again exist as was explained to the people of the State of New York by Alexander Hamilton. Cases will then be decided in the federal court system "under the laws of the United States," Article III, Section 2, and in the state courts under the laws of the states as "reserved to the states," Tenth Amendment, with a review thereafter in the federal court if appropriate.

In his conclusion, petitioner contends that there is no obstacle to the filing and

prosecuting of a claim against the county by virtue of RCW 4.96.010 and RCW 4.08.120. However, it was deemed to be an obstacle of such substantial proportions that the petitioner was compelled to request in the complaint that a three-judge panel be constituted under 28 U.S.C.A. § 2281 in order to make such a determination.

The argument of petitioner misses the point that the purpose of the federal Civil Rights Act is to make "persons" primarily liable for their actions and not have secondary liability avoid that purpose. The determination of secondary liability, or here the liability of the County, should be made separately in state court, not determined at the same time by the federal court because of the application of pendent jurisdiction. Otherwise, Moor v. County of Alameda, supra, and City of Kenosha v. Bruno, 412 U.S. 507, 37 L.Ed.2d 109, 93 S.Ct. 2222 (1973), will be overruled sub silentio.

In addition, the ramifications of the extension requested in the case at bar should be considered with the case of Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971), in mind. What state claim will not be subject to creation so that it can be joined with some federal "case as a whole" by virtue of pendent jurisdiction to be established in the federal system? This absurd result would be in derogation of plain constitutional principles which should be applied in this case.

The petitioner alleges that the crafty defendant appreciates the opportunity to sit back and watch the case develop and then take advantage of it. Respondent wonders why this is objectionable? Is it because it does not allow a crafty plaintiff to take advantage of a defendant by the use of the doctrine of pendent jurisdiction which is discretionary at best under present holdings?

III

PETITIONER'S COMPLAINT ON ITS FACE FAILED TO ALLEGE A STATE CAUSE OF ACTION OVER WHICH A FEDERAL COURT COULD EXERCISE PENDENT JURISDICTION.

Even assuming the existence of pendent jurisdiction, fatal to petitioner's attempt to invoke the doctrine is her failure to allege anywhere in the complaint a valid, presently existing state cause of action against the respondent Spokane County, upon which the Federal District Court might exercise its power. Pendent jurisdiction simply does not exist in a vacuum. Rather, it is a judicially created doctrine which federal courts have seen fit to invoke when presented with complaints alleging a substantial federal claim, coupled with a cause of action or a "claim" which is brought under state law.

In the instant case, petitioner would have this Court create a state cause of action which petitioner admits in her complaint is presently non-existent under state law. This can be seen from an examination of petitioner's second amended complaint (App. 12-17).

Petitioner specified five causes of action in her second amended complaint,

alleging violations of the First, Ninth and Fourteenth Amendments to the United States Constitution and alleging the unconstitutionality of § 36.16.070 of the Revised Code of Washington (App. 15-16).

Petitioner apparently sought to invoke the doctrine of pendent jurisdiction by two statements in the section of her complaint denominated PARTIES. In paragraph 5 of the second amended complaint, petitioner alleged that the defendant, Howard, was acting as the agent of defendant, Spokane County (App. 13). Finally, in paragraph 6 of the section entitled PARTIES, the petitioner alleged that "defendant Spokane County is a public corporation and an action may be maintained against it authorized by RCW 4.08.120" (App. 14).

Section 4.08.120 of the Revised Code of Washington provides in pertinent part as follows:

> "Actions against public corporations. An action may be maintained against a county . . . either upon a contract made by such county, . . . or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation."

Although appearing nowhere in the pleadings, petitioner mentions in the conclusion of the brief RCW 4.96.010, which provides:

> "Tortious conduct of political subdivisions, municipal corporations and quasi municipal corporations--Liability for damages. All

> political subdivisions, municipal corporations, and quasi municipal corporations of the state, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their officers, agents or employees to the same extent as if they were a private person or corporation: PROVIDED, That the filing within the time allowed by law of any claim required shall be a condition precedent to maintaining of any action. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory."

However, the petitioner in her complaint specifically alleged that "Plaintiff's dismissal was authorized by § 36.16.070 of the Revised Code of Washington" (App. 12, 14, 15, 16).

Revised Code of Washington § 36.16.070 provides as follows:

> "Deputies and Employees. In all cases where the duties of any county office are greater than can be performed by the person elected to fill it, the officer may employ deputies and other necessary employees with the consent of the Board of County Commissioners. The Board shall fix their compensa-

> tion and shall require what deputy shall give bond and the amount of bond required from each. The sureties on deputies' bonds must be approved by the Board and the premium therefor is a county expense.
>
> A deputy may perform any act which his principal is authorized to perform. The officer appointing a deputy or other employee shall be responsible for the acts of his appointees upon his official bond and may revoke each appointment at pleasure."

Under the cited section of Washington law, any deputy or other employee appointed by the Spokane County Treasurer serves at the pleasure of the Treasurer. Consequently, no state cause of action whatsoever was alleged against the respondent, Spokane County, because of the action by the Spokane County Treasurer according to expressed statutory authorization.

The petitioner appears to be attempting to create a state cause of action by a "boot strap" operation. Petitioner appears to be arguing that if and when the Washington law is changed by a finding of unconstitutionality of RCW 36.16.070, then at that time a cause of action will likewise have been created against the County arising from the agency relationship of the treasurer.

It would appear that petitioner is urging a new concept of pendent jurisdiction indeed when she alleges in one breath the existence of a state statute, to-wit:

RCW 36.16.070, which provides complete authority under state law for the County Treasurer's actions, and in the next breath alleges that "The Federal District Court may exercise Pendant [sic] Jurisdiction over the state law claims against the parties."

Further reason for the inapplicability of the doctrine of pendent jurisdiction to the petitioner's complaint is that the very creation of a "Pendent state law claim" would require the empaneling of a three-judge court. Again, petitioner herself has recognized this express requirement of 28 U.S.C. §2281. In petitioner's prayer for relief, she has asked that a three-judge district court be convened (App. 16). Consequently, it appears clear from the very face of petitioner's complaint that no pendent state claim exists when the complaint alleged in all five of the causes of action that the plaintiff's dismissal was authorized by Washington law (App. 15-16).

Accordingly, the respondent respectfully submits that this particular case is the worst possible vehicle for the expansion of a doctrine with such far reaching implications as that of pendent jurisdiction. On the face of its complaint, petitioner has negated any application of such doctrine in this instance.

CONCLUSION

We contend that the doctrine of pendent jurisdiction has been judicially created and extended as a doctrine in equity for

the plaintiff without recognition of constitutional provisions of limitation and questions of unfairness to the defendant.

Therefore, the decision of the District Court for the Eastern District of Washington and the decision of the Ninth Circuit Court of Appeals should be upheld in this case and the judgment affirmed.

Respectfully submitted,

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Supreme Court, U. S.
FILED
MAR 9 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6521

MONICA ALDINGER,

Petitioner,

v.

MERTON HOWARD, individually and in his capacity as Treasurer of Spokane County, and
SPOKANE COUNTY, a public corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

I.

THE DOCTRINE OF PENDENT JURISDICTION IS CONSTITUTIONALLY SOUND.

The issue before this Court, set forth more fully in the petitioner's opening brief, is properly narrowed to the power of the Court to join pendent parties. The

Respondent, misconstruing the issue, contends that the doctrine of pendent jurisdiction itself is unconstitutional. This conclusion relegates to obscurity the substantial judicial history of the doctrine, which has consistently reflected the court's reliance upon pendent jurisdiction as a necessary tool for the exercise of its proper function.

Respondent suggests that the federalist papers support his contention. This document does not and cannot speak with authority. This series of letters, representing efforts by Alexander Hamilton, James Madison, and John Jay to "sell" the U.S. Constitution to the ratifying convention of New York, merely reflects the opinions of the authors at a time when fear of joining a union with a strong central government was widespread. These letters were written in a political climate in response to a specific need and political purpose.

The Constitution itself however, does not support the respondent's contention. It has been held repeatedly by this Court and others that the Constitution allows the federal courts the power to exercise pendent jurisdiction over related non-federal claims. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). The Constitution, Article III, Section 2 states that "(the) judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States. . . ." As Chief Justice Marshall held as early as 1824, the above grant of federal jurisdiction contemplates and authorizes the adjudication of any non-federal issues necessary to the resolution of the federal claim. *Osborne v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 6 L.Ed. 204 (1824). To hold otherwise would severly restrict the

ability of the federal courts to entertain many cases. Extended to the extreme proposed by the respondent, most multiple claim cases, both with and without multiple parties, would be either absurdly fragmented or duplicated within the state court system because few complex cases involve purely federal or constitutional issues.

Marshall's characterization of "case" as encompassing every question necessary to provide complete relief has never been rejected. This sound judicial principle has been refined by the collective wisdom and consideration of the federal courts for over 150 years.

II.

THE INCLUSION OF PENDENT PARTIES WOULD NOT "OPEN THE FLOOD GATES".

Respondent suggests that the federal courts would be deluged with state claims as a result of the doctrine of pendent jurisdiction. To the contrary, courts have frequently cited the *promotion* of judicial economy as a basis for invoking pendent jurisdiction. See e.g. *Hatridge v. Aetna Casualty & Surety Co.*, 415 F.2d 809 (8th Cir. 1969). Courts have had little trouble finding that judicial economy is preserved when all of the claims of all parties involved are included in one legal proceeding.

The question that a trial court must give serious attention to is whether it is possible and appropriate to resolve all of the claims in one trial rather than two or more. Cases often involve more than one claim and frequently more than two parties. Under the recognized

principles of pendent jurisdiction, it is necessarily within the discretion of the trial court to determine if all of the issues presented are appropriately resolved in one judicial proceeding.

The cases cited in petitioner's opening brief indicate that the doctrine of pendent jurisdiction has been sparingly applied. Judicial discretion appears to have served as an excellent check upon the wholesale infusion of state claims into the Federal Court system. See e.g. *Patrum v. City of Greensburg, Kentucky*, 419 F.2d 1300 (6th Cir. 1969). Accordingly, denying the trial court the power to join pendent claims and parties would remove an important aspect of discretion and would increase the burden upon the judicial system without appreciably decreasing the number of cases filed in the Federal Courts. The application of the doctrine of pendent jurisdiction does not result in additional cases being filed in the Federal Court system because, for the doctrine of pendent jurisdiction to be available, there must already be an existing and substantial federal claim.

III.

THE DOCTRINE OF PENDENT JURISDICTION DOES NOT AND WILL NOT CAUSE UNFAIRNESS OR INCONVENIENCE TO LITIGANTS.

Respondent suggests that forcing a litigant into Federal Court is unfair to that litigant. Again, that the doctrine of pendent jurisdiction is a discretionary doctrine destroys the validity of this contention. There is no reason to doubt that the exercise of sound judicial

discretion by the District Court would not be an effective mechanism to prevent abuse and insure fairness to litigants. Indeed, discretion is the keystone of the effective functioning of the judicial system as we know it. See 4, Wright and Miller, FEDERAL PRACTICE AND PROCEDURE, § 1029, p. 129 (1969).

Respondent's fears are misconceived. Pendent jurisdiction, and it's close relative ancillary jurisdiction, involve a federal court's power to invoke subject matter jurisdiction. It does not concern the jurisdiction the Court may have over the parties involved which may be secured by proper service of process upon an individual who has certain minimum contacts with the forum state or district. *See Block Industries v. DHJ Industries, Inc.*, 495 F.2d 256 (1974).

Where personal jurisdiction over a party has been or can be obtained, the salient question to be asked is whether the Court has subject matter jurisdiction over the claims involved. The doctrine of pendent jurisdiction has long been recognized as a legitimate basis for exercising subject matter jurisdiction over related but otherwise non-federal claims. See *United Mine Workers v. Gibbs*, supra. The joinder of a pendent party would not require an expansion of subject matter jurisdiction beyond that already permitted. The incidental inclusion of an appropriately related non-federal party has not been considered a bar to this common sense approach. As Wright states:

> If the ancillary and pendent jurisdiction doctrines are sound, there seems to be little justification for not extending their application to cases involving joinder of parties under Rule 20, provided, of course, that the test established by the Supreme Court in *United Mine Workers of America v. Gibbs*, (Footnote ommitted) as well as the

requirements of Rule 20(a) have been met. The same notions of judicial economy, trial convenience and fairness to litigants that allow the application of pendent and ancillary jurisdiction when joining claims by or against a single party seem to be equally applicable when the court is dealing with multiple parties. Concern that substantial individual issues, such as damages, might consume the court's energy or allow state claims to "ride on the coat tail" of the jurisdictionally sufficient claim overlooks the screening function served by the Gibbs test and the restraint exercised by federal courts. 7, Wright and Miller, FEDERAL PRACTICE AND PROCEDURE § 1659, P. 315 (1972).

Respondent further suggests that pendent jurisdiction is being used as a device to extend the allowable scope of an action filed pursuant to 42 U.S.C. 1983. That this is absurd is demonstrated by the wide diversity of cases set forth in the petitioner's opening brief. Pendent jurisdiction, specifically the addition of pendent parties, has been accomplished in a wide variety of cases and is not specific to any one basis of federal jurisdiction. Pendent jurisdiction is a doctrine that cuts across jurisdictional lines and is quite universal in its application. The Court need merely inquire as to the relative advantages versus the disadvantages of hearing all related claims against all involved parties in one rather than two judicial proceedings. The original basis of the jurisdiction-granting claim is immaterial to this determination.

IV.

THE PETITIONER HAS STATED A CLAIM AGAINST THE "PENDENT PARTY".

As a collateral matter, the respondent contends that the petitioner has failed to state a claim against the defendant Spokane County over which the district court may assert pendent jurisdiction. This contention is immaterial as well as invalid. Because of the liberal pleading standards of the Federal Rules of Civil Procedure and of the Washington Court Rules, such a contention is totally without merit.

Petitioner, in her second amended complaint, alleged that she had been damaged by the individual defendant and then set forth an agency relationship between that defendant and the county defendant. (App. 13-14) The complaint, admittedly not impeccably plead, contains sufficient information to inform the county defendant of the nature of the cause of action against it and to enable it to respond. This is sufficient under Rule 8, Fed. R. Civ. P., as well as under CR 8 of the Washington Court Rules. In fact, the complaint sets forth all of the elements of a claim of vicarious liability against the defendant County under Washington law.

The essence of Rule 8, and the various rules dealing with the form and substance of pleading, is that pleadings must provide "fair notice" of what the plaintiff's claim is and the grounds upon which it rests. *Conley v. Gibson*, 355 U.S. 41, 48 (1957). Considerable leeway is permitted as long as the defendant is given fair notice. As *Conley* held, a complaint should not be dismissed unless it appears beyond doubt that the plaintiff is not entitled to relief under any state of facts which could be proved in support of the claim.

In addition, Rules 15(a) and (b) permit a party to amend his pleadings by leave of the court, such leave to be "freely given when justice so requires". Leave may be granted at any time, even after judgment. Leave is typically granted in response to a motion to dismiss pursuant to FRCP 12(b)(6) or CR 12(b)(6), and must be given even though the Court doubts that the defect can be cured. See *Cross v. Byrum*, 348 F. Supp. 196 (S.D. Fla. 1972).

Finally, FRCP 54(c) and CR 54(c) permit the Court to grant, by final judgment, the relief to which the party is entitled even if such relief has not been demanded in his pleadings.

The clear intent of the Federal Rules as well as the Washington Court Rules militates against dismissal of actions when the pleadings provide fair notice to the defendant. This is especially so when the pleadings can be clarified by simple amendment. Accordingly, there exists a state claim over which the district court may exert pendent jurisdiction.

Respondent apparently raises this issue for the purpose of avoiding a decision. Certiorari was granted in this cause to resolve a serious conflict between several courts of appeals about an important issue of federal jurisdiction. It was not granted to handle a routine question of the sufficiency of the pleadings that is within the purview of the trial court to resolve.

CONCLUSION

The question of "pendent parties" was recently addressed by the First Circuit Court of Appeals. For an enlightening view of the dilemma presented to a trial

court faced with a complex case with multiple claims and parties, See *Bowers v. Moreno*, 520 F.2d 843, 846 (1st Cir. 1975). It is interesting to find at the conclusion of that court's analysis, the statment "... this case is one where, if there had not existed a doctrine allowing federal jurisdiction over "pendent parties", it would have had to be invented."

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

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